



















# REPORTS OF CASES

DECIDED IN THE

## COURT OF QUEEN'S BENCH,

BY

H. C. W. WETHEY,

BARRISTER-AT-LAW AND REPORTER TO THE COURT.

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CHRISTOPHER ROBINSON, Q.C.,

EDITOR.

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VOL. XLI.

CONTAINING THE CASES DETERMINED  
FROM HILARY TERM, 40 VICTORIA, TO EASTER TERM, 40 VICTORIA,  
WITH A TABLE OF THE NAMES OF CASES ARGUED,  
A TABLE OF THE NAMES OF CASES CITED,  
AND A DIGEST OF THE PRINCIPAL MATTERS.

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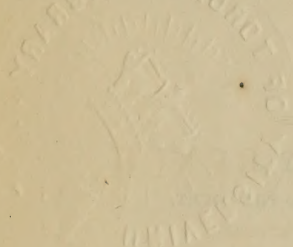
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REPORTS OF CASES

NUMBER 12

COURT OF QUEEN'S BENCH



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VOL. 21

CONTENTS OF THE VOLUME  
THIS VOLUME CONTAINS THE REPORTS OF THE  
COURT OF QUEEN'S BENCH IN THE  
YEAR 1891. THE CASES ARE  
ARRANGED IN THE ORDER OF  
THEIR DECISION.

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J U D G E S  
OF THE  
COURT OF QUEEN'S BENCH,  
DURING THE PERIOD OF THESE REPORTS.

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THE HON. ROBERT ALEXANDER HARRISON, C. J.  
" " JOSEPH CURRAN MORRISON, J.  
" " ADAM WILSON, J.  
" " JOHN DOUGLAS ARMOUR, J.

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THE HON. OLIVER MOWAT.





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# REPORTS OF CASES

IN THE

## COURT OF QUEEN'S BENCH.

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HILARY TERM, 40 VICTORIA, 1877.

*From February 5th to February 17th.*

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*Present :*

THE HON. ROBERT ALEXANDER HARRISON, C. J.

“ “ JOSEPH CURRAN MORRISON, J.

“ “ ADAM WILSON, J.

---

REGINA V. WILKINSON (*a*).

*Libel—Criminal information—Delay in application for—Denial of the charge complained of.*

S., the relator, a Senator of the Dominion and president of a bank, applied on the last day of Michaelmas Term, 1875, for a criminal information against one W., the editor of a newspaper, for three alleged libellous articles published therein. The first, published on the 5th November, 1875, charged the relator with political intriguing, alleging that “his now famous circular to the electors of South Ontario, his extending credit at a suspicious time to institutions that control votes, his impudent letter to the Finance Minister, his consultation with the Government as to his reply to certain charges made against him, all point too clearly to the fact of intrigues in political matters.” The second article, published on the 12th November, 1875, accused him of having purchased the votes of three Members of Parliament on the occasion of a political crisis referred to, and of having boasted of so doing. The third article, published on the 19th November, 1875, accused the applicant of corruption, referred in terms of ridicule to his assertion that he had never spent a dollar to purchase or secure a vote, and reiterated the charge of buying up members.

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(*a*) This case was decided in E. T. 1876, and the two following cases in M. T. 1876. The report of them has been delayed owing to the press of other matter, and the judgments have already been published at length in the daily papers.

The substance of the libels of the 12th and 19th November had previously appeared in defendant's paper of the 17th September, but the relator swore that he had no recollection of having seen it.

*Held*, 1. That the application was not too late.

The complainant must come to the Court either during the term next after the cause of complaint arose, or so soon in the second term thereafter as to enable the defendant, unless prevented by the accumulation of business in the Court, to shew cause within that term; and this without reference to the fact whether an assizes intervened or not.

2. As to the first article, that the applicant's denial of the charge then made was not sufficient; for though his affidavit denied in general terms the charges made, it contained no reference to the circular, or to the letter referred to in the article, or to the alleged consultation with the Government; and these matters being specified in the article as justifying the charge of political intriguing, the Court should have been informed with regard to them, so as to enable them to judge whether they formed ground for the charge. The information as to this article was therefore refused, and the applicant left to his ordinary remedy.

The denial in such an application must, as a rule, be full, clear, and as specific as possible; and all the circumstances must be laid before the Court fully and candidly, in order that they may deal with the matter.

Per WILSON, J., upon the circular referred to, and upon other documents set out, and which were brought before the Court by the defendant, the charge of political intriguing was so far sustained, that the application should be refused on this ground also.

The charges in the second article were, in the affidavits set out below, held to be sufficiently denied. There was no affidavit of their truth, and no suggestion that the defendant had any personal knowledge of the facts on which the charges rested, so that he would be prejudiced by being excluded as a witness on his own behalf. As to these, therefore, the information was granted.

#### APPLICATION for criminal information for libel.

*K. McKenzie*, Q.C., during Michaelmas term, December 3, 1875, upon reading the three several affidavits of Frederick Loscombe, and the three several affidavits of the Hon. John Simpson, and the affidavit of David Fisher, and part of the printed paper dated on the 5th day of November, 1875, annexed to the said affidavits filed, beginning with the words, "To the charge of political intriguing," and ending with the words, "He hath been guilty of both these offences"; and also part of another printed paper dated on the 12th day of November, in the year aforesaid, annexed to the affidavit of Frederick Loscombe, and to the affidavit of the Hon. John Simpson filed, beginning with the words, "The party referred to by us," and ending with the words, "and others named in our charge by other parties"; and also part of another printed paper, dated on the 19th day of November, in the year

aforesaid, annexed to the affidavit of Frederick Loscombe and to the affidavit of the Hon. John Simpson filed, beginning with the words, "Senator Simpson has telegraphed to the *Ottawa Free Press*," and ending with the words, "We are not going to let side issues or general statements draw attention from this one fact," and affidavits and papers filed—moved for a rule *nisi* calling on John A. Wilkinson to shew cause why an information should not be exhibited against him for certain misdemeanours in printing and publishing certain scandalous libels in the said printed papers contained.

The affidavits of Frederick Loscombe, which were sworn on the 1st of December, 1875, proved that John A. Wilkinson was the printer and publisher, in the town of Bowmanville, of a weekly newspaper called the *West Durham News*, and in the issues of the said newspaper on the 5th, 12th, and 19th of November, 1875, published the alleged libels (copies of which deponent produced and verified).

Mr. Simpson, the applicant, made an affidavit in reference to each alleged libel separately.

The first affidavit of Mr. Simpson, which was sworn on 2nd December, 1875, was as follows:—

1. I am now, and have been since 1867, a Senator of the Senate of Canada, and I am now, and have been for several years last past, President of the Ontario Bank.

2. I have read an article which was printed and published in a certain newspaper called the *West Durham News*, printed and published at the town of Bowmanville, in the county of Durham, one of the united counties of Northumberland and Durham, on the 5th day of November, 1875, which said article so printed and published as aforesaid is headed, "The Ontario Bank and its President," and part of which said article so read by me as aforesaid, and printed and published as aforesaid in the said newspaper as aforesaid, is in the following words:—

"To the charge of political intriguing, Mr. Simpson cannot put in the plea of innocence. The history of past



elections in the riding is such that every man who knew anything of the circumstances at the time of the contests knows that substantial aid for corrupt purposes was secured through Mr. Simpson. His now famous circular to the electors of South Ontario, his extending credit, at a suspicious time, to institutions that control votes, his impudent letter to the Finance Minister, his consultation with the Government as to his reply to certain charges made against him—all point too clearly to the fact of intrigues in political matters. But if these were not sufficient, the partiality shewn to the Ontario Bank by the Government in the matter of deposits would complete the presumptive evidence. But we may add to this his own boasting to several parties of how much money he has paid out for the purposes of bribery. Is a man who can use the money of others corruptly or against their interests fit to be placed in the responsible position of Bank President, or is one who can use the influence that the money of others, entrusted for the time to his control, gives him for corrupt purposes, or against the interest of the proprietors of such funds, the right man to fill such a position? If not, then it is evident that Mr. Simpson is the wrong man for the position he now fills, for it is certain he has been guilty of both these offences."

3. The printed newspaper hereto annexed, called the *West Durham News*, containing the said article, was printed and published by J. A. Wilkinson on the 5th day of November, 1875, at the town of Bowmanville aforesaid, and the said article herein referred to, and the part thereof herein referred to and herein set out, were so printed and published by him at the time and place aforesaid, in the said newspaper hereunto annexed.

4. I am the person referred to in the said article, and the part thereof herein set out, as "Mr. Simpson" and "Bank President."

5. I say that the said article, and the part thereof herein set out, and published in the said newspaper, called the *West Durham News*, on the said 5th day of November, in the year aforesaid, at Bowmanville aforesaid, and the statements, charges, and imputations therein contained against me, are false, malicious, and without foundation in fact, and are intended to prejudice and injure me.

6. I further say that the statements, charges, and imputations contained in the said articles, and parts thereof herein set out against me for political intriguing, and of securing substantial aid for corrupt purposes, and that I have paid out money for the purposes of bribery at elections, and that I used the money of others corruptly, are untrue, false, and malicious.

7. I say that I have not been engaged in political intriguing in the West Riding of Durham, in which Bowmanville is situate, at past elections, and that the part I took in election contests was just and legal, without aid for corrupt purposes as alleged in the said part of the said article so published as aforesaid.

8. I say I have never used the money of others corruptly or against their interest; and, in the responsible position of the President of the Ontario Bank, I honestly discharged my duties as such President for the interest of the bank, its shareholders and customers, and have not boasted paying out money to any person for the purpose of bribery; and that these and other allegations and charges contained against me in the said article and every part thereof are false and malicious, and published, as I verily believe, with intent to injure, prejudice, and vilify me.

9. I verily believe that the said article, and the said parts thereof herein set out, were printed and published in the said printed newspaper called *The West Durham News*, hereunto annexed, by the said J. A. Wilkinson, for the purpose and with the intent falsely and maliciously to represent, and to cause it to be believed by the readers thereof, that I was guilty of the charges and imputations therein contained against me.

10. That the said J. A. Wilkinson was, on the 5th day of November, in the year aforesaid, the publisher of the said newspaper called the *West Durham News*, containing the said article, and still is the publisher thereof.

11. I further say that from the starting of the Ontario Bank up to the present time not one cent of the moneys

of the said bank has been expended or used for political purposes, and that the allegations of corrupt transactions having taken place between the Government and the Ontario Bank are utterly untrue, and without any foundation whatever.

His second affidavit, also sworn on 2nd December, 1875, was as follows :—

1. I am now, and have been for several years, a Senator of the Senate of Canada, and President of the Ontario Bank.

2. I have read an article which was printed and published in a certain newspaper called the *West Durham News*, on the 12th day of November, 1875, at the town of Bowmanville aforesaid, which said article so printed and published as aforesaid, in the said newspaper, on the day and year and place aforesaid, is headed "Our Charges Again," and part of which said article so read by me as aforesaid, and printed and published in the said newspaper as aforesaid, is in the following words :—

"The party referred to by us as the head of a public institution, who purchased three votes at the time of the crisis, is the Hon. John Simpson, President of the Ontario Bank. Our evidence in the case was secured in this way. Mr. Simpson boasted to different parties, without even asking if they would accept of the confidence, of having bought these votes, and paid as high as \$30,000 for them. We at first doubted the truthfulness of the boast, and looked upon it simply as a bit of swagger. Finding, however, that the same story had been repeated by him, we were at last led to institute a search, knowing that if Mr. Simpson bought these votes at such prices more had been purchased ; which was rewarded in the substantiation of the fact of the purchase by Mr. Simpson and the others named in our charge by other parties."

3. The printed newspaper hereunto annexed, and called and headed the *West Durham News*, contains the said article, and was printed and published by J. A. Wilkinson, on the 12th day of November, in the year 1875, at the

town of Bowmanville aforesaid ; and the said article herein referred to, and the part of the article herein referred to and set out, were so printed and published by him, the said J. A. Wilkinson, at the time and place aforesaid in the said newspaper hereunto annexed.

4. That I am the person referred to in the said article and part thereof and herein set out as "the Hon. John Simpson, President of the Ontario Bank," and as "Mr. Simpson."

5. I say that the said article so published as aforesaid, and the part thereof herein set out, and published as aforesaid in the said newspaper called the *West Durham News*, on the 12th day of November, in the year aforesaid, at Bowmanville aforesaid, and the statements, charges, and imputations therein contained against me, are false and malicious, and without any foundation whatever in fact, and were and are intended to prejudice and injure me.

6. I further say that the statements and charges contained in the said article, and the parts thereof herein set out, charging me with purchasing three votes at the time of the crisis, are utterly false ; and I say further that I never bribed or purchased any member or members of Parliament, or a voter, or votes, or electors during my lifetime, and that I have not paid \$30,000, or any sum whatever, for three votes, or any votes whatever ; and that the statements in regard to the same in the said part of the said article herein set out are false in every respect, and malicious and without foundation, and made and published, as I verily believe, to prejudice and injure me.

7. That I verily believe the said article and the said part thereof herein set out, were printed and published in the said printed newspaper called the *West Durham News*, hereunto annexed, by the said J. A. Wilkinson, for the purpose and with the intent falsely and maliciously to represent to and cause it to be believed by the readers thereof, that I was guilty of the said charges and imputations therein contained against me.

8. That the said J. A. Wilkinson was, on the said 12th



day of November, in the year aforesaid, the publisher of the said newspaper, and still is the publisher of the *West Durham News*.

9. I further say, in regard to the charge stated in the said article of my having boasted that I had bought votes and paid as high as \$30,000 for them, that it is untrue; but I might have said, and no doubt have said, after my return from Ottawa, A. D. 1873, that it was a common rumour at Ottawa that money had been freely offered for votes during the crisis; but I never said that I bought votes; and I positively swear I never bought or paid money for any votes then or any other time during my life, or offered to purchase or pay for any such votes.

His third affidavit, also sworn on 2nd of December, 1875, was as follows:—

1. I am now, and have been for several years past, Senator of the Senate of Canada, and President of the Ontario Bank.

2. I have read an article which was printed and published in a certain newspaper called and headed the *West Durham News*, on the 19th day of November, 1875, at the town of Bowmanville aforesaid, which said article so printed and published as aforesaid, in the said newspaper, on the day and year and at the place aforesaid, is headed "Senator Simpson's Denial," and a part of the said article so read by me as aforesaid, and printed and published as aforesaid in the said newspaper, is in the following words:—"Senator Simpson has telegraphed to the *Ottawa Free Press* that 'he never spent a dollar in his life to purchase or secure a vote of a member or an elector on behalf of himself or any other party.' There are many in this riding will say, 'Tell that to the marines.' Who sent the \$2,000 to Clarke at the time of the Blake-Milne election? And who is it that still holds a claim of \$800 for money spent at that time? Were we allowed so wide a scope as to prove that Mr. Simpson had been guilty of corruption, we should have no trouble in fastening abundance of it upon him; indeed, we are compelled to look upon him as one of the most corrupt



men in Canada; but our charge at this time is, that he bought up members of the Commons to defeat Sir John Macdonald's Government at the time of the crisis in 1873, and we are not going to let side issues or general statements draw attention from this one fact."

3. The printed newspaper hereunto annexed, called and headed the *West Durham News*, contains the said article, and was printed and published by John A. Wilkinson on the 19th day of November, in the year aforesaid, at Bowmanville aforesaid, and the said article herein referred to and the part thereof herein set out were so printed and published by him, the said John A. Wilkinson, at the time and place aforesaid, in the said newspaper hereunto annexed.

4. I am the person referred to in the said article, and in the part thereof herein set out as "Senator Simpson" and as "Mr. Simpson."

5. I say that the said article so published as aforesaid, and the part thereof herein set out and published as aforesaid in the said newspaper called the *West Durham News*, on the said 19th day of November, in the year aforesaid, at Bowmanville aforesaid, and the statements, charges, and imputations therein contained against me are false and malicious, and without any foundation whatever in fact, and were and are intended to prejudice and injure me.

6. I further say that the statements, charges, and imputations contained in the said article, and part thereof herein set out, against me in regard to the sending of two thousand dollars to Clarke, and holding a claim of eight hundred dollars for money spent are false and without foundation; and that I have been guilty of corruption as therein insinuated is untrue and without any foundation whatever; and the charge therein contained that I bought up members of the Commons to defeat Sir John Macdonald's government at the time of the crisis in 1873 is false and malicious, and without any foundation whatever in truth, and was made and published, as I verily believe, to prejudice and injure me.

7. That I verily believe the said article, and the said part thereof herein set out, were printed and published in the said printed newspaper called the *West Durham News*, hereunto annexed, by the said John A. Wilkinson for the purpose and with the intent falsely and maliciously to represent and cause it to be believed by the readers thereof that I was guilty of the said charges and imputations therein contained against me.

8. That the said J. A. Wilkinson was on the said 19th day of November, in the year aforesaid, the publisher of the said newspaper called the *West Durham News*, containing the said article, and still is the publisher of the *West Durham News*.

The affidavit of David Fisher, sworn on 2nd December, 1875, was as follows:—

1. That I was the cashier of the Ontario Bank from its establishment in 1857 until the month of May, 1875, and have been since, and I am now general manager of said bank.

2. That I have read the article contained in the printed newspaper hereunto annexed, and say that from the starting of the Ontario Bank in 1857 up to the present time not one dollar of the money of the said bank has been expended or used for political or election purposes, and that the allegation of corrupt transactions having taken place between the Government and the bank is utterly untrue, and without any foundation in fact; but that, on the contrary, every transaction between the bank and the Government has been purely and entirely conducted on the ordinary commercial considerations and business principles between a bank and its customers.

The following affidavit of the defendant was read on shewing cause:—

2. That on the 24th day of September, in the year of our Lord, 1875, there was published in the *West Durham News* (referred to in the affidavit filed on the application for the rule calling on me to shew cause why a criminal information should not be filed against me by the Hon. John

Simpson) portion of a letter from the Hon. Geo. Brown to the said John Simpson, as appears by a copy of said newspaper marked "A." hereunto annexed as an exhibit, which said letter was afterwards, on Sept. 30th, 1875, published in full in the daily *Mail* newspaper (which is published as a daily newspaper in the city of Toronto) as appears by a copy thereof marked "B" hereunto annexed as an exhibit. The following is a copy of the letter referred to as exhibit B:—

"TORONTO, 15th August, 1872.

"MY DEAR SIR,—The fight goes bravely on; but it is hard to work up against the enormous sums the Government candidates have in their hands. We have expended our strength in aiding the out counties and helping our candidates; but *a big push* has to be made on Saturday and Monday for the East and West Divisions, if we are not to succumb to the cash of the Government. We could carry all three divisions easily but for the cash against us; and if we carry the first on Saturday the other two will go with us in spite of all the cash they can muster. We therefore make our grand stand on Saturday. There are but half a dozen people that can come down handsomely, and we have all done what we possibly can do, and we have to ask a very few outsiders to aid us. Will you be one? I have been urged to write you, and comply accordingly.

Things look well over the Province. With all their money we shall beat them hollow in Ontario, and things look bright in Quebec.

"Faithfully yours,

"GEO. BROWN.

"Hon. John Simpson, &c., &c."

3. That the said George Brown was, on the 15th August 1872, and for many years previously was, and has since continued to be an active and prominent politician and a leader in the political party known as the Reform or Clear Grit party, to which same party the said John Simpson also belongs; and that the *Globe* newspaper hereafter mentioned is, and has been for many years previously to the year 1872, the leading organ of the said political party, and that the said George Brown is manager of the *Globe* Printing and Publishing Company, by which company the *Globe* newspaper (a daily paper published in the city of Toronto) is printed and published; and on September 27th, 1875, a letter or article appeared therein with reference to

his said letter to said John Simpson over the name of said George Brown, and purporting to be signed by him, wherein, in reference to the said letter, he admits that some such letter was written by him, and therein uses the following language: "I have no copy of the letter from which these extracts are stated to have been taken. But I have some recollection of writing some such letter about the time mentioned to three or possibly four political friends. I assume, therefore, that the words quoted above have been culled from a letter of mine."

4. That the said Hon. John Simpson has never to my knowledge denied having received said letter, and I am credibly informed, and do verily believe, that he did in fact receive the same, and that he replied or caused a reply to be written thereto.

5. That on January 17th, 1874, a circular was, as I am informed, and verily believe, issued and circulated by the said Hon John Simpson among the customers of the Ontario Bank (of which said John Simpson was at the time president) in the Riding of South Ontario with reference to the general election for the House of Commons which was then being or about to be held, at which election the Hon. T. N. Gibbs and the Hon. Malcolm Cameron were the rival candidates, the latter being the candidate of the Reform and Clear Grit party, and being supported as such by the said party and the said John Simpson. The said circular, or what he represented to be the same or the purport thereof, was afterwards published by the said Hon. John Simpson in the *Globe* newspaper of September 7th, 1874, as appears by a copy thereof hereunto annexed as an exhibit and marked "D."

The following is an extract from the circular above referred to:—

"BOWMANVILLE, January 17, 1874.

"———, Esq.,

DEAR SIR,—Although I am not disposed to oppose Mr. Gibbs on personal grounds in the approaching elections, still as one who has laboured long and hard to promote the interests of Canada, I now ask my friends to support men *who will support the present Government*, for the following reasons:—

For the country's good, and to shew to England that we Canadians will not sustain or tolerate men who will barter our rights and stain our character for base and sordid motives.



Because many of the men forming the present Government are my personal and esteemed friends.

Because, if the present Government is sustained, I will be able through them to get justice for our party in needful appointments and otherwise.

Because, if they are sustained, our bank and other Ontario banks—and through them the country—will have the use of the Government surplus until required.

May I ask you to give my old friend, Mr. Cameron, your candid and honest support?

I am, yours truly,

J. SIMPSON."

6. That the said letter of the said Hon. John Simpson was, or purported to be, in reference to the publication of what purported to be a circular written by the said Hon. John Simpson, made in the said *Mail* newspaper, a true copy of which is hereunto annexed, and is marked as an exhibit with the letter "E."

7. That from the fact of the said Hon. George Brown having written the said letter to the said Hon. John Simpson, inviting and soliciting his aid to a fund which I verily believed and do believe was intended to be used corruptly, and for the purpose of corrupting the electorate, and that the said Hon. John Simpson had not in any way repudiated the said application to him, or manifested either indignation or surprise at the request thereby made (as I verily believe he did not), and from the fact of the said John Simpson (as and being the president of the said Ontario Bank) having issued the said circular for the illegitimate purpose of corruptly influencing those to whom it was addressed, or amongst whom it was circulated, and from the fact that, as appears (as does in fact appear) from the bank statements, published by authority, that the said Ontario Bank had, since the present Government succeeded to power, obtained much larger deposits from the Government than the other banks doing business in the Dominion, and from the fact that the said John Simpson was, and continued to be up to the time of the publication of the article complained of, an ardent and active political partizan of the party supporting the present Government, I became convinced that the said John Simpson was not scrupulous or particular as to the means he resorted to or countenanced for the purpose of promoting the political ends he had in view or desired to see accomplished; and I further became convinced that the information which was

given to me as hereinafter mentioned, and which was subsequently in substance published in the said *West Durham News* newspaper in some or one of the articles complained of as libellous, was true in fact.

8. That previously to the articles published in the said *West Durham News* on the fifth, twelfth, and nineteenth days respectively of November last, similar charges had been made in the said newspaper, as appears by extracts therefrom hereunto annexed as exhibits, and marked respectively "F," "G," "I," and "J."

9. That the said *West Durham News* newspaper is and has been regularly sent every week to the office of the said Hon. John Simpson.

10. That as to such of the statements as are made in the said *West Durham News* of the fifth, twelfth, and nineteenth days respectively of November last, alleged to be libellous, and which do not refer to or are based on the facts and documents hereinbefore mentioned, or set forth, or referred to, I received information of their truth from credible and reliable sources, which I had every reason to believe, and which I had no reason to doubt, and which I in fact and in truth did believe, and having such belief, and in the belief that it was for the public interest that the said matters should be published, I did, without malice, and in good faith, cause the same to be published as aforesaid.

11. That I have not, and never had, any personal acquaintance with the said Hon. John Simpson, and never had nor sought to have any dealings with him in any way whatever, and was not in publishing said charges, and am not now, and never have been, actuated by any malicious motive whatever against the said Hon. John Simpson, or the said bank of which he is president, and I had not, nor have I now, any design of doing said John Simpson any personal injury, but I acted simply and solely in the belief that I was doing my duty in the premises as a public journalist, and that it was for the interest of the public that the said charges should be made.

During this term, May 27, 1876, *C. Robinson*, Q. C., and *D. McCarthy*, Q. C., shewed cause. A criminal information should not be granted; first, because the application for it had not been made with that promptitude which the practice of the Court requires; secondly, because there has been no

denial sufficiently explicit of the charges made by the defendant ; and lastly, because the plaintiff has himself shewn by his conduct that he is not entitled to the extraordinary remedy sought. [Counsel here read the affidavits of Mr. Simpson on which the latter based his application.] The articles of which Mr. Simpson complained were not by any means the first in which the charges against him which they contained were made. On August 27th, the one appeared in which it was said:—"We would like the *Merchant* \* \* to inform us \* \* how much it cost the Ontario Bank to defeat Mr. Milne in this riding. \* \* How much money did Hon. J. Simpson pay out of the Ontario Bank to help in the last general election?" In another article, which appeared in the *West Durham News* on September 17th, 1875, the following words occurred:—"Buying up a majority in the House to defeat Sir John's Government, partly by office and partly by cash ; two votes of which Hon. John Simpson bought out of the Ontario Bank, and paid over \$30,000; for evidence of which we are willing to take his word." Here was a specific charge of the same character as the gravest of which Mr. Simpson complained, and yet although on the 16th of October the assizes for the county in which the alleged libel was published, and in which the case should have been tried, took place, the plaintiff left it unnoticed and uncontradicted, and did not take any action against the defendant until the end of Michaelmas term last. Occupying the position which Mr. Simpson did, it was important, on more than private grounds, that he should have taken the earliest opportunity of vindicating his character ; and if he had done so he would have availed himself of the opportunity of these assizes held in October, If, however, he did not see fit to go to those assizes, he should have moved early in the following term (which was within the next three weeks) for the criminal information. [HARRISON, C. J.—Mr. McKenzie, when moving the rule, said that the affidavits could not be got ready earlier.] Toronto was easily accessible by rail from where he (Mr.

Simpson) lived, and the affidavits could have been made out in three days. The plaintiff's counsel did not move until the last day of Michaelmas term, and had consequently allowed other business to accumulate in front of this case, so that it had to be set down on the paper for late in the following term, and a second assizes to be passed over. This application, therefore, has not been made with sufficient promptness. There seems to be no specific rule laid down as to the time within which an application should be made; but the general rule is, that there must be no unnecessary delay: *Rex v. Jollie*, 4 B. & Ad. 867; *Rex v. Harries*, 13 East 270; *Rex v. Marshall*, 13 East 322; *Rex v. Smith*, 7 T. R. 80; *Starkie* on Slander, 3rd ed., p. 674.

Secondly, there is not in the affidavits of the plaintiff a sufficient and distinct denial of the charges made against him. These charges refer specifically to several distinct things; and the authorities are clear that a person coming to Court for a criminal information must not content himself with any general denial of the charges made. The general rule is, that the denial must be in the words of the article; and further, if there be anything in the article which, although not contained in the defined charges, points to information which it would be desirable for the Court to have before granting an application, it is the duty of the applicant to bring that information before the Court: *Regina v. Aunger*, 28 L. T. N. S. 630. The first article said:—"To the charge of political intriguing, Mr. Simpson cannot put in the plea of innocence," which, being a general charge, not specifying any one in particular, might perhaps be met by a general denial. The article next says, "The history of past elections in the riding is such that every man who knew anything of the circumstances at the time of the contests knows that substantial aid for corrupt purposes was secured through Mr. Simpson"; and that, "His now famous circular to the electors of South Ontario, his extending credit at a suspicious time to institutions that control votes, his impudent letter to the Finance Minister,



his consultation with the Government as to his reply to certain charges made against him—all point too clearly to the fact of intrigues in political matters.” The writer of the article expressly refers to what he calls the “now famous circular” as proof of the truth of the charge that Mr. Simpson had been guilty of political intriguing and of corrupt conduct in reference to elections. It was Mr. Simpson’s duty therefore, in applying for a criminal information for the article in question, to have brought before the Court that document which is referred to in the article as a justification of the charge. Mr. Simpson has not done this, however, but has left the reference to the circular entirely unnoticed. The article goes on to say, “The partiality shown to the Ontario Bank by the Government in the matter of deposits would complete the presumptive evidence. But we may add to this his own boasting to several parties of how much money he has paid out for the purposes of bribery.” In his denial Mr. Simpson does not refer to this remark as to his boasting; he does not say anything about the circular; he takes no notice whatever of the charge that he had extended credit to institutions which had the control of votes; he says not a syllable about his letter to the Finance Minister, although he might easily have said he never wrote any letter of that kind, if that were the fact. He says nothing about his consultation with the Government; nor does he deny specifically in any way having used the influence which the control of the money he had gave him, as the article further charged that he did. The last was a very important point, but it is passed over altogether in his affidavit, which he calls a denial. In the other articles there is a charge of the plaintiff having bought up the votes of three members of Parliament; and in the third the question is asked, “who sent the \$2,000 to Clarke at the time of the Blake-Milne election? And who is it that still holds a claim of \$800 for money spent at that time?” In his denial he, Simpson, says:—“I honestly discharged my duties as such President for the interest of the bank, its shareholders and its customers, and



have not boasted paying out money to any person for the purpose of bribery." What had been said on this point was in the first article, and was as follows:—"But if these were not sufficient, the partiality shown to the Ontario Bank by the Government in the matter of deposits would complete the presumptive evidence. But we may add to this his own boasting to several parties of how much money he has paid out for the purposes of bribery." In the denial with regard to the third article—there is nothing in the second which it can be said was not distinctly denied—the applicant says, that "the statements, charges, and imputations therein contained against me are false and malicious, and without any foundation whatever, in fact." A denial from Mr. Simpson that he ever sent that money to Clarke would have been better. He should have said, "I did not send it, and was not connected with the sending of it": *Rex v. Haswell*, 1 Doug. 387; *Rex v. Wright*, 2 Chitty 162; *Rex v. Taylor*, 1 Jur. 53. [HARRISON, C. J., called the counsel's attention to *Regina v. Plimsoll*, reported in the *London Times* of 1873. It was reported nowhere else (a).] The rule with regard to criminal informations, is that the person who complains of being libelled may pick out what he believes to be the libel, and when he comes into Court to ask for that extraordinary remedy he must prove his innocence of every single imputation made against him before the information will be granted: 2 *Broom* 586-8. The plaintiff's circular to the customers of the Ontario Bank was published in the *Globe* of September 7th, 1875; and when Mr. Wilkinson found that circular in the *Globe* he was fully justified in believing that it was a genuine letter written by Mr. Simpson. If Mr. Simpson had come forward and said in his affidavit that it was quite true that circular had been published in the *Globe*, and had been talked of during the past two years as having been written by him, but he had not written it, of course the defendant would have apologized for having said so. But instead of Mr. Simpson's doing this, he had written to the *Globe*, after the substance of the circular had been

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(a) Now reported in 12 C. L. J. N. S. 227.

published in *The Mail*, stating that *The Mail* had misrepresented it, and giving a copy of the circular. This document furnishes clear proof of the corrupt use of political influence. It is well known that throughout Ontario, and especially in comparatively small communities, no person is more in a position to use undue influence than the president of a bank, even when not possessed of the additional influence of a Senator, as the plaintiff was. The language of the circular should be noted. It was addressed not to a public meeting, but to people with whom Mr. Simpson thought it would have the most influence. Mr. Simpson does not venture to touch upon the charge the defendant said the circular justified him in making, viz., that of having improperly used for political purposes the influence which his control of the money of the bank of which he was president gave him; and therefore that charge stands as justified. The letter also of the 15th August, 1875, put in by the defendant, furnishes proof of the charge made, in the absence of any sufficient explanation. Mr. Simpson therefore does not come into Court with clean hands, and is not entitled to the remedy for which he asked: *Regina v. Plimsoll*, 12 C.L.J.N.S. 227. As to the charge of the plaintiff having purchased the votes of three members of Parliament, which is specifically denied, and not shewn to be true, Mr. Wilkinson states that he published that charge as a public journalist, without malice, and when the time comes for the plaintiff to seek redress properly, the defence will be disclosed.

*J. H. Cameron, Q. C., contra.* The *Plimsoll Case* can not govern the present case in anything more than some of the main principles which have been laid down; but not only the cases cited on the other side, but cases also which have been before the Courts of this Province, shew that the plaintiff is entitled to a criminal information. It would be difficult to find a precedent anywhere for refusing a criminal information when the party against whom it is sought has proceeded to the length and in the manner in which the defendant here has proceeded. With regard to the first objection to the criminal information being

granted, viz., that the plaintiff is late in making his application, several cases already referred to, and some others to be cited, shewed that when the parties are engaged in persistently following up a course of libel the ordinary rule does not apply, except in the case of a public officer being the person against whom the criminal information is asked for. As it is not uncommon to charge public men with using corrupt influence, they might be looked upon as too thin skinned if they took action on every occasion as soon as such an allegation with regard to them was made; and the defendant might plead, under the law relating to libel, that he was only acting in the public interest. But when, in the present case, the charges against the plaintiff were repeated again and again, and when everything in which he would desire to preserve himself right in his position as a Senator and as a president of a bank was called into question, then it was that Mr. Simpson prepared himself to make this application, and gave his denial to the allegations which had been made; and it was not until after that denial had been noticed by the papers, and the allegations reiterated with additional charges, that he came to Court and asked for a criminal information. The charges were repeated on the 19th of November, and the application was made during that term. The defendant's counsel would not consent to the case being argued during term, and therefore no refusal of the application could be based on that ground. This case is peculiar from the fact that the libels continued from the time of the first publication of them down to the latest possible period. The second and third articles appeared in term; and within ten days after that the rule *nisi* was applied for and granted, and every subsequent proceeding has been taken as rapidly as it could be. In every case reported, the delay, where it was held an objection, was much greater than here, and there is no case which justifies the defendant in saying that action in this instance was not taken as soon as it should have been. [WILSON, J.—In one of the articles did not the defendant in this case challenge the plaintiff to take up

the charges which he made?] Yes; he not only challenged him, but said he would be prepared to bear the expenses. With regard to the second objection, that the applicant had not specifically denied the charges, the applicant has taken the same course that was taken in *Regina v. Thompson*, 24 C. P. 252. The denials are exactly in substance the same as those which were made and pronounced on in that case. See also *Regina v. Moylan*, 19 U. C. R. 521, in which an information was granted on the same grounds as here. In the position in which the applicant was placed, if he shews that in one matter there has been a libel on him, and no attempt to justify it is made, he is entitled to have his rule made absolute. In the case of *Regina v. Plimsoll*, everything depended on the simple fact whether the ship was overloaded or not; and if there had been no overloading the rule for the criminal information would have been granted—it was refused because the Court could not see that the charge that the vessel was overloaded (which was complained of as a libel) was untrue. What the defendant in this case has charged specifically the plaintiff has denied specifically. It is said that the applicant does not come into Court with clean hands; and that he has not put before the Court the whole case as it was. In reply to that, it may be said that the defendant has done what, according to the judgment in the *Plimsoll Case*, affords the plaintiff legal ground upon which to go—the defendant admits the publication of the articles complained of, but does not pretend to offer the Court any justification for them, nor to the Court nor to the applicant any apology for, or retraction of them. Nor does the defendant say in any way that he can prove the charges he has made. No case can be found in which, under such circumstances, a criminal information has been refused. The applicant has, it is said, not brought into Court the circular letter as a part of this case, but that letter was not connected with the specific allegations in the case? [HARRISON, C. J.—The circular letter was referred to in the so-called libel as a sort of



justification for it.] It was referred to, but it was not set out, and there was no reason why the applicant should not set it out. Mr. Simpson's position as a Senator and as a president of a bank entitle him to consideration. No attempt is made to justify the gravest charge made against him, that of bribing members of Parliament; and no sufficient answer therefore has been made to this application.

*K. McKenzie*, Q. C., on the same side. If Mr. Simpson had boasted over and over, as alleged, that he had bought three members of Parliament, where are those men, and who are they? [HARRISON, C. J.—The charge is a very serious one.] It is an assault on the honour of the country at large, and there is not a word of truth in it. In reply to the objection that the applicant has delayed coming into Court, it may be said that on the 12th of November the charge that Mr. Simpson had purchased three members of Parliament was made, and on the 13th or 14th the applicant telegraphed to the Ottawa papers denying the charge. Mr. Wilkinson did not then retract the charge, as he should have done; but he published another article, in which he said that Mr. Simpson had denied the charge, and added, "Tell that to the marines." The moment the paper in which this appeared was brought to Mr. Simpson, he took these proceedings. The applicant did not see the papers in which the articles regarding him previous to those complained of appeared.

*Robinson*, Q. C.—The defendant states in his affidavit that they were sent to Mr. Simpson's office; and if he had not seen them, an affidavit from Mr. Simpson to that effect should be put in.

An additional affidavit was afterwards filed by Mr. Simpson. In it he swore, among other things, that he had no recollection of ever seeing a copy of the *West Durham News* of 27th August, or 17th September, till he saw them attached to the affidavit filed herein by the defendant: that he is not a subscriber for the said newspaper, or a reader of it, and that if it was sent to the office of the Ontario Bank, in Bowmanville, it was not sent at his request or for his use.



June 29, 1876. HARRISON, C. J.—The first objection raised to the granting of the information is, that the application was not promptly made.

The alleged libels were published on 5th, 12th, and 19th November, 1875, respectively. The substance of the libel of 12th and 19th of November first appeared in the defendant's newspaper under date of 17th of September, 1875. It is asserted by the defendant that this paper was weekly sent to the bank of which the applicant is the president, but the relator does not appear to have been aware of it, or to have any recollection of seeing the articles affecting him published prior to the 12th November.

It is argued that having allowed the Fall Assizes to pass without going before the grand jury, and having waited till the last day of Michaelmas Term following, the relator is now too late to invoke the remedy of criminal information, even if in other respects entitled to it.

A person alive to the vindication of his character when assailed, and entitled to the remedy of criminal information must apply with reasonable promptitude.

The general rule is stated by Lord Mansfield in *Rex v. Robinson*, 1 W. Bl. 542, where he said "There is no precise number of weeks, months, or years; but if delayed, the delay must be reasonably accounted for."

In *Rex v. Smith*, 7 T. R. 80, Lord Kenyon expressed a doubt whether it was not contrary to the practice of the Court to grant an information against a magistrate so late in the term that he could not shew cause against it in the term and whether the application should not be deferred till the next term; but the officers of the Court certifying that such a motion might be made at the end of the term for supposed misconduct during the term, and that the practice alluded to only applied to cases where the fact complained of happened before the commencement of term, a rule *nisi* was granted, but, as the reporter says, "a similar motion was immediately afterwards refused in *Rex v. Beavis* and two other justices of the peace in Devonshire for supposed malpractices on the 4th July then last."

In *Rex v. Marshall*, 13 East 322, it was held that in the case of magistrates the motion must be made early enough in the second term (no assize having intervened) to allow of their shewing cause during that term. See further *Rex v. Harries*, 13 East 270.

This rule has been extended to other public officers : *Rex v. Hartley et al.*, 4 B. & Ad. 869, note.

In *Rex v. Jollie et al.*, 4 B. & Ad. 867, it was held, that a motion for a criminal information against a newspaper publisher might be made later than the second term after the offence, where it was shewn that the prosecutor did not know the fact in time to make an earlier application.

In *Regina v. Saunders*, 10 Q. B. 484, it was held that a criminal information against a magistrate in the second term after the alleged misconduct, made early enough to allow of cause being shewn during the same term, was in sufficient time, although an assize had intervened.

In *Rex v. Bishop*, 5 B. & Al. 612, where the alleged misconduct took place twelve months before the application to the Court, the information was refused, although the prosecutor, in order to excuse the delay, stated that the facts had not come to his knowledge till very shortly previous to the application.—Abbot, C. J., saying, p. 613: "We do not, by discharging this rule, shut the door to enquiry, for a bill of indictment may still be preferred against the defendant. But if we were to admit this excuse, we should entirely frustrate the very useful rule to which we have been referred."

In an anonymous case reported in Lofft, 273, the Court said to the applicant "You have staid three terms, it will be a great expense, go to the grand jury."

The rule laid down in *Rex v. Marshall*, 13 East 322, and in *Rex v. Harries*, 13 East 270, is qualified by the words "no assizes having intervened," but this qualification, which was extra-judicial, was disregarded in *Regina v. Saunders*, 10 Q. B. 484.

I take the rule to be that the party complaining must come to the Court, either during the term next after

the cause of complaint arose, or at so early a period in the second term thereafter as to enable the accused, unless prevented by the accumulation of business in the Court, to shew cause within the second term; and this, regardless of the fact whether an assize intervened or not. See *Rex v. Murray*, 1 Jur. 37; *Regina v. Harris*, 8 Jur. 516. See *Regina v. Kelly et al.*, 28 C. P. 35.

Applying this rule, it clearly appears that the present application is in sufficient time.

The second objection to the information is, that the applicant has not explicitly denied the charges made against him, and has not with sufficient candour laid all the facts bearing on the charges before the Court.

It is almost an invariable rule not to grant a criminal information without an exculpatory affidavit from the party complaining: *Rex v. Haswell*, 1 Doug. 387. If it is not the universal rule it is the general rule that the party applying must deny the charge specifically, or give his reasons why he cannot deny it, or state on oath that he does not understand the imputation: per Quain, J., in *Regina v. Aunger*, 28 L. T. N. S. 634, S. C. 12 Cox 407. The denial must be full, clear, and explicit: *Rex v. Taylor*, 1 Jur. 53; *Rex v. Athay*, 2 Burr. 53; *Rex v. Wroughton*, 3 Burr. 1683; *Rex v. Borron*, 3 B. & Al. 432.

It is of the highest importance that the relator should in all cases lay before the Court all the circumstances fully and candidly, in order that the Court may deal with the matter: see per Blackburn, J., in *Regina v. Aunger*, 28 L. T. N. S. 634, S. C. 12 Cox 407. The only exceptions to the rule as to the production and requirement of the affidavit is, where the party libelled is abroad at a great distance, or the subject matter of the charge is a general imputation, or an accusation of criminal language held in Parliament: *Rex v. Wright*, 2 Chitty 162.

A party who wants a criminal information must place himself entirely in the hands of the Court. If it appear that the party has put himself into communication with

the publisher of the libel, for the purpose of retorting, or with a view of obtaining redress, or has in any manner himself attempted to procure redress, or take the law into his hands, the remedy by criminal information will be refused: *Ex parte Beauclerk*, 7 Jur. 373. See further *Rex v. Larrieu*, 7 A. & E. 277; *Regina v. Lawson*, 1 Q. B. 486, S. C. 1 G. & D. 15.

The libels of which complaint is made by Mr. Simpson are three in number. There is a separate application in respect to each, for each is supported by the independent affidavit of the applicant.

The first is a general charge of political intriguing. It is distinctly charged that at past elections in the riding substantial aid for corrupt purposes was secured through the applicant. In support of this charge reference is made to "the now famous circular" to the electors of South Ontario, the extension of credit by the applicant at a suspicious time to institutions that control votes, his "impudent letter" to the Finance Minister, his consultation with the Government as to certain charges made against him. It is said that all these point to the fact of intrigues on the part of the applicant in political matters. And that if these are not sufficient the partiality shewn to the Ontario Bank by the Government in the matter of deposits, would complete the presumptive evidence. To all this is added the applicant's own boasting to several parties of how much money he paid out for the purposes of bribery. The subsequent part of the alleged libel is an argument based on the foregoing as facts, and from which the conclusion is drawn that the applicant is not the right man to fill the position of president of the Ontario Bank.

The relator in his affidavit supporting his application for a criminal information, as to the publication of the 5th November, 1875, denies in general terms that he was engaged in political intriguing in the riding, and affirms that the part which he took (not saying what part he took) in election contests was just and legal, without aid for corrupt purposes. He denies that he ever used the money of others



(saying nothing as to his own money) corruptly or against their interests. He affirms that he honestly discharged his duties as president of the bank, its shareholders and customers. He denies that he ever boasted paying money to any person for the purpose of bribery, and concludes with the general allegation "that these and other charges contained against him in the said article, and every part thereof, are false and malicious," &c.

The relator in his affidavit makes no reference to the so-called famous circular, his extending credit at a suspicious time to institutions that control votes, his impudent letter to the Finance Minister, his consultation with the Government as to his reply to certain charges made against him, and the partiality shewn to the Ontario Bank in the matter of the grants. It was his duty to have given us some information on these points (so strongly put against him in the affidavits of the defendant), in order that we might on his application have formed some judgment as to whether there was any ground for honestly making the charge against him of political intriguing.

He does not admit whether the so-called famous circular produced by the defendant is genuine or not. There is no reference to it either in the applicant's original affidavits or in the affidavit subsequently filed.

So far as the alleged libel of 5th of November, 1875, is concerned, he has, we think, failed to bring before the Court all the circumstances connected with the transactions of which he complains, and for that, if for no other reason, we must refuse, as to that libel, the leave asked to file a criminal information.

The question in such a case, as stated by Lord Kenyon in *Rex v. Webster*, 3 T. R. 388, is not whether the doors of justice shall be stopped, but whether justice shall be approached by this particular avenue.

We must, under the circumstances, leave the relator, as regards the first libel, to the ordinary remedy of action or indictment: *Rex v. Peach et al.*, 1 Burr. 548; *Rex v. Bickerton*, 1 Str. 498; *Ex parte Smith*, 21 L. T. N.S. 294.



The second alleged libel, under date 12th November, 1875, in effect accuses the applicant of having purchased three votes at the time of "the crisis." The evidence alleged is, that he boasted to different parties, without asking if they would accept of the confidence, of having bought three votes and paid as high as \$30,000 for them.

This may be properly read in connection with the third alleged libel, under date 19th November, 1875, which adverts to the fact that the applicant had telegraphed to the *Ottawa Free Press* that he had never spent a dollar in his life to purchase or secure a vote of a member or of one elector on behalf of himself or any other party, and then reiterates the charge. The writer follows up the accusation with the inferential charge that the applicant sent \$2,000 to Clarke at the time of the Blake-Milne election, and that he still holds a claim of \$800 for money spent at that time, and concludes with the direct charge that the applicant "bought up members of the Commons to defeat Sir John A. Macdonald's Government at the crisis in 1873."

The relator, in his affidavit in support of the application, so far as the two libels of 12th and 19th of November, 1875 are concerned, in general terms affirms that the statements, charges, and imputations therein contained against him are false and malicious, and without any foundation whatever in fact.

Besides, he in the first affidavit applicable to the charge of 12th November, 1875, affirms that he never bribed or purchased any member or members of Parliament in his life, or a voter or voters during his life, and denies that he paid \$30,000, or any sum whatever, for three votes or any votes whatever. He also in a subsequent part of the same affidavit denies that he ever so boasted, but admits that he might have said after his return from Ottawa in the year 1873, that it was a common rumour at Ottawa that money had been freely offered for votes during the crisis.

The relator in his affidavit applicable to the charge the 19th November, 1875, denies that he sent \$2,000 to Clarke, and denies that he holds a claim of \$800 for money spent at that election. He also characterizes the charge that

he bought up members of the Commons to defeat Sir John A. Macdonald's government as false and malicious, and swears that it has no foundation in truth.

It appears to us, so far as the alleged libels of the 12th and 19th November, 1875, are concerned, that the charges are distinctly denied, and that the affidavits of the relator applicable thereto are full and in all respects sufficient for the purposes of the application.

But, thirdly, it is objected that the applicant does not come into Court with "clean hands," and therefore ought not to be heard under any circumstances in support of such an application: *Regina v. Plimsoll*, The Times, June 16th, 1873.

The granting of a criminal information is discretionary with the Court under all circumstances: *Anon*, Lofft 323; *Rex v. Robinson*, 1 W.Bl. 541. The application is not to be entertained on light or trivial grounds: *Rex v. Mead*, 4 Jur. 1014. In dealing with such an application, the Court has always exercised a considerable extent of discretion in seeing whether the rule should be granted, and whether the circumstances are such as to justify the Court in granting the rule for a criminal information. Per Blackburn, J., in *Regina v. Plimsoll*, The Times, 16th June, 1873.

There are two things principally to be considered in dealing with such an application: 1. To see whether the person who applies to conduct the prosecution—the relator or the informer—has been himself free from blame, even though it would not justify the defendant in making the accusation; 2. To see whether the offence is of such magnitude that it would be proper for the Court to interfere and grant the criminal information.

Both of these things have to be considered, and the Court would not make its process of any value unless they considered them and exercised a good deal of discretion, not merely in saying whether there is legal evidence of the offence having been committed, but also exercising their discretion as men of the world, I may say, in judging, whether there is reason for a criminal information or not.

Per Blackburn, J., in *The Queen v. Plimsoll*, The Times, 16th June, 1873 (a). See also per Mr. Justice Quain, in the same case.

When a party is assailed by a grave and serious libel, he may either bring an action, in which case the defendant will be heard, or, if the charge is of such a character that he is not satisfied with proceedings of that kind, he may apply to the Court and waive his right of action. But I think it is a safe rule, where he takes the latter course, to say that he must deal with perfect candour with reference to all the circumstances of the case; and he ought to make it appear not only that he is free from blame, but that his conduct is such that there is no colour for the imputations cast upon him. Per Archibald, J., in *Regina v. Aunger*, 28 L. T. N. S. 634; S. C. 12 Cox 407.

In a matter like a criminal information, the object of which is to punish a man, the Court will not grant the application unless the circumstances are such as to shew that the relator not only has the object in view of clearing his own character, but that he is also a proper person to be entrusted with it, and that the circumstances are such as to render the proceedings a public benefit: Per Blackburn, J., *Ib.*

The charge made against the relator of purchasing votes of members of Parliament on the occasion of an important political crisis, is of the most grave and serious kind. It affects not only the character of the applicant, who is a senator of the Dominion Parliament, but the honour of the House of Commons of the Dominion. It is of such magnitude that its importance cannot be exaggerated. No attempt is made in the affidavit of the defendant to shew the truth of it. But the honour of the country demands that the stigma deliberately cast on the fair name of the Dominion Parliament should, if there be no truth in it, be forever removed. Such a slander, if it be a slander, on the highest legislative body in the Dominion, should not be allowed forever to float in the

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(a) Now reported, 12 C. L. J. N. S. 227.

political atmosphere—an atmosphere which in no country is more pure than it ought to be—and in our country is sometimes, to say the least of it, a little hazy. The people of our country should be taught that its future greatly depends on the honour, honesty, and purity of its public men.

So far as the alleged libels of the 12th and 19th November, 1875, are concerned, I am prepared to deal with them as if the alleged libel of 5th November, 1875, were not before the Court. They are not necessarily connected. A separate application is made in respect of each.

In the first, in point of date, there is much generality; but in the second and third, serious charges are specifically made, and as specifically denied. The relator, after the publication of the second libel, it appears, denied it in a communication to a newspaper in Ottawa. Notwithstanding the denial the defendant repeated the accusation, if possible in terms more specific and in colours more black than before, and in doing so asserted that he is prepared to prove the charge out of the mouth of the relator who, so far from concealing, openly boasted of his shame. The relator denies that he ever bribed as alleged, or boasted as alleged. He, however, with proper candour, brings before the Court the fact of a rumour in Ottawa at the time of the crisis that money had been freely offered for votes during the crisis, and admits that he may have spoken, and says that no doubt he did speak of the rumour, but nothing more. The affidavit of the defendant in no manner answers this part of the application. And there does not, on the papers before us, appear to be any ground whatever for this charge.

Considering, so far as this part of the application is concerned, the serious nature of the charges contained in the publication of 12th November, their reiteration in the publication of the 19th November, the explicit denial of the relator, his candour, as shewn in the affidavit of denial applicable to this charge, and the weakness of the defendant's answer, we must make absolute so much of the



rule as asks leave to exhibit an information in respect of the alleged libels of the 12th and 19th November, 1875.

It is true this is an application for an extraordinary remedy, and therefore the Court will not grant it lightly. But they will do justice, and therefore they will not withhold it if the nature of the case require it: per Lord Mansfield in *Rex v. Dennison*, Lofft 149.

We do not lightly grant it as regards the two last publications. The nature of the case, as shewn in the affidavits of the relator, is such as, in the absence of an affidavit of truth, or a retraction and apology, to demand the remedy. There is no attempt at retraction or apology, and there is really nothing disclosed to shew truth. The case, therefore, as regards the two last publications is a proper one for the exercise of our discretion in favour of granting the leave asked. If it were shewn that the defendant had any personal knowledge of the facts out of which the charges are supposed to arise, we might hesitate to grant the information, the effect of which would be to prevent his giving evidence on his own behalf, and instead of doing so might leave the relator to his remedy by action, where each party would be eligible as a witness on his own behalf. But as nothing of the kind is suggested on the part of the defence, we have no hesitation in making absolute the rule to the extent last mentioned, and discharging it as to the residue.

WILSON, J.—The application for leave to file a criminal information against the defendant for the publication of a libel against the Honourable John Simpson, a member of the Senate of the Dominion, is based upon three different articles, contained in the public newspaper, *The West Durham News*, published by the defendant, on the 5th, 12th, and 19th of November, 1875.

The first article imputes to the complainant political intriguing, in and respecting parliamentary elections, for corrupt purposes.

And it refers (1) to the complainant's now famous circu-



lar to the electors of South Ontario; (2) to his extending credit at a suspicious time to institutions that control votes; (3) his impudent letter to the Finance Minister, and (4) his consultation with the Government as to his reply to certain charges made against him—as all pointing too clearly to the fact of intrigues in political matters. And if these are not sufficient, the partiality shewn to the Ontario Bank, of which the complainant is the president, in the matter of deposits, would complete the presumptive evidence.

It charges him also with boasting how much money he had paid out for the purposes of bribery.

It then concludes: “Is a man who can use the money of others corruptly, or against their interests, fit to be placed in the responsible position of bank president? Or is one who can use the influence that the money of others entrusted for the time to his control gives him for corrupt purposes, or against the interests of the proprietors of such funds, the right man to fill such a position? If not, then it is evident that Mr. Simpson is the wrong man for the position he now fills, for it is certain that he has been guilty of both these offences.”

The complainant has denied the matters referred to in the first article very specifically, relating to the main charge.

He has not denied what is called his famous circular to the electors; nor his extending credit at a suspicious time to institutions that control votes; nor his letter to the Finance Minister; nor his using the influence that the money of others entrusted to him gave him for corrupt purposes.

I presume this circular to the electors, and the letter to the Finance Minister, are not intended to be denied. They have been made use of by the defendant as part of the case he has made in resisting this motion.

It was contended by Mr. Robinson, in shewing cause, that these documents, if not denied by the complainant, should have been made a part of his case, in order

to shew that they furnished no proper ground or pretext for the use of them by the defendant, and no justification for the article which he published.

I am of opinion they should have been presented to the Court by the complainant as a part of his case. They might have warranted the strong language employed by the defendant; and without seeing them the Court is not able, from the want of a complete and perfect case on the part of the complainant, to say that he has vindicated himself from the charges which have been made against him, and that the defendant should be put upon his trial for the publication of a false and malicious libel.

One of these documents is now before us, having been presented by the defendant; and it is not necessary to consider what course we should have been obliged to adopt if these documents had not been shewn to us, and if the defendant had relied upon the application of the strict rule in such a case against the complainant: *Regina v. Stanger*, L. R. 6 Q. B. 352.

These documents, and a third one filed by the defendant, being a letter from the Hon. George Brown, dated the 15th of August, 1872, to the complainant, it will be material to consider, because if they shew political intriguing in parliamentary elections for corrupt purposes, or conduct of that nature, or improper and unjustifiable, the extraordinary aid of the Court should not be invoked for the service of the complainant. He should be left to the ordinary common law remedies, which are in the power of every one who is injured and who seeks for redress.

The circular to the electors, which is dated the 17th of January, 1874, begins by a statement that the complainant is not disposed to oppose Mr. Gibbs, one of the candidates in the approaching election, on personal grounds; but he asks his friends to support men who will support the present Government, for the following reasons:—

1. For the country's good, and to shew to England that we Canadians will not sustain or tolerate men who will barter our rights and stain our character for base and sordid motives.

2. Because many of the men forming the present Government are my personal and esteemed friends.

3. Because, if the present Government is sustained, I will be able, through them, to get justice for our party in needful appointments and otherwise.

4. Because, if they are sustained, our bank and other Ontario banks (and through them the country) will have the use of the Government surplus until required.

And it concludes, "May I ask you to give my old friend, Mr. Cameron, your candid and hearty support."

This letter was written by the complainant, it is admitted, while he was a Senator and the President of the Ontario Bank, and not long before an election for a member for the House of Commons; and it is also admitted by the complainant in the same publication, which was sent to the *Globe* newspaper and printed on the 7th of September, 1875, that he took a pretty active part in that election, and that he wrote or had written a number of these circular letters to various friends of his in the riding. The letter to the Finance Minister is not given, but the complainant says of it in the publication last referred to, he did write a letter complaining bitterly of the manner in which the government surplus had been disposed of by the late government, greatly to the prejudice of Ontario for many years, and he did ask him to right the wrong.

The other letter referred to is one not written by, but written to the complainant on the 15th of August, 1872, by Mr. Brown, in which it is stated, "the fight goes bravely on, but it is hard to work up against the enormous sums the government candidates have in their hands. We here have expended our strength in aiding the out counties and helping our city candidates, but a big push has to be made on Saturday and Monday for the east and west divisions, if we are not to succumb to the cash of the government. We could carry all three division easily but for the cash against us, and if we carry the first on Saturday, the other two will go with us in spite of all the cash they can muster. We, therefore, make our grand stand on Saturday. There are but half a dozen people that can come down hand-

somely, and we have all done that we possibly can do, and we have to ask a very few outsiders to aid us. Will you be one? I have been urged to write you, and comply accordingly."

Upon reading these documents, one written by the complainant, and the other written by a person whom the defendant represents in his affidavit to be "an active and prominent politician and a leader in the political party known as the reform or clear grit party, to which party the said John Simpson also belongs."—The defendant also says: "That the said Honorable John Simpson has never to my knowledge denied having received said letter, and I am credibly informed and do verily believe that he did in fact receive the same, and that he replied or caused a reply thereto to be written,"—I confess it appears to me that the charge of political intriguing is very reasonably made out.

A senator, according to the rule of the Parliament—if the like rule applies here which exists in England as respects the members of the House of Lords—has no right to interfere in the elections of the other house. Whether that rule applies here or not under the 18th section of the Confederation Act, need not be strictly determined.

The rule in England is, "That it is a high infringement of the liberties and privileges of the Commons of the United Kingdom, for any lord of Parliament, or other peer or prelate, \* \* to concern himself in the election of members to serve for the Commons in Parliament." And upon that, *Warren*, in his *Election Law*, 1757, vol. 1., p. 237, adds: "While such interference on the part of peers is thus forbidden and denounced, equally unconstitutional and reprehensible is that of commoners, or in fact of any one in whatever rank or station of society, when exercised for the purpose of warping the free and spontaneous choice of electors. \* \* The greater, therefore, is the moral obligation incumbent on the possessor of that wealth, to avoid an undue exercise of it, especially to violate the spirit, even if possibly not the letter of the constitution, in one of its grandest attributes. Wealth has, and ought to have, such



influence; but it should be used legitimately. The law, however, can deal with overt acts only; and then it is generally found impossible to fix upon individuals."

Whether there was a strict obligation upon the complainant as a senator, not "to concern himself in the election of members to serve for the Commons in Parliament," there was, I may be permitted to say, "a moral obligation incumbent" upon him not to do so.

It strikes one as too obvious to require argument that there is an impropriety, to say the least of it, in a senator interfering with a House of Commons election.

These bodies, while they act together in the performance of their high duties, are at the same time a guard and a check in the even working of our constitution upon each other; and upon the crown as well, for the public welfare; and that the Senate, a permanent body nominated too by the crown, should take a part by canvassing, electioneering or partizanship of any kind in forming the body which is to be especially the representative of the popular will, seems to be very incongruous and objectionable; or, in the language of the rule before referred to, "a high infringement of the liberties and privileges of the Commons."

The interference of the complainant in the election referred to was therefore properly the subject of comment, and of very forcible comment, especially when that interference was "a pretty active part," and by means of the distribution of "a number of circular letters" to various friends of his in the riding, to oppose one candidate and to support another.

The defendant might fairly observe too upon the singular combination of motives contained in the circular. The patriotic aspiration, the "country's good," and the desire "to shew to England that we Canadians will not sustain or tolerate men who will barter our rights or stain our character for base and sordid motives," are mixed up with the plainer promptings of the individual, to support the ministry, who "are my personal and esteemed friends"—"to get justice for our party in needful appointments and

otherwise;" and lastly, to benefit "our bank and other Ontario banks, (and through them the country,") by "the use of the government surplus until required."

The two latter purposes are plainly enough put—party "appointments and otherwise," and free deposits of government money in the bank of which the complainant was president; but they would scarcely "shew to England that we Canadians will not sustain or tolerate men who will barter our rights and stain our character for base and sordid motives."

A letter expressing such sentiments and spread broadcast through the riding for election purposes, might well be called political intriguing, and a public writer would not be going beyond the proper limits of fair criticism if he spoke of it plainly as of that character.

In addition to that, the letter which the complainant received from Mr. Brown must also be considered. It has acquired a political notoriety, from the position of the parties concerned, and from the directness of its purpose, the peculiar force of its appeal, and the ordinary and business like manner in which it treats it as perfectly legitimate to apply money on the polling day upon any electoral crisis.

The Court may properly take notice of those matters, which every other person of ordinary intelligence is acquainted with; and therefore it is I speak of the letter as one of some political notoriety.

It is true the complainant was only the receiver of that letter, but he has not, it is said, repudiated it, but replied to it. What that reply was does not appear. The complainant has given no explanation of himself with respect to it, as he was bound to do. In the absence of any statement about it, it must be assumed, on such an application as this, that he cannot make any satisfactory explanation to the court concerning it.

It is of course a plain demand for money to oppose, it is said, the expenditure of the government candidates at the Toronto elections; and it is an admission that the writer

and those co-operating with him had expended their *strength*, which I suppose means their money, in other constituencies for the like purposes. It is a letter written for corrupt purposes, to interfere with the freedom of elections. It is an invitation to the recipient, as one with some others and the writer, to concur in committing the offence of bribery and corruption at the polls.

In the face of these documents, the charge of political intriguing by, and of securing substantial aid for corrupt purposes through, the complainant, is a fair and proper ground of argument and of inference; and whether the defendant has gone too far in attributing the corrupt use of the bank's funds for the like purpose, I am not called upon to decide. It is sufficient to say, that if there is a just ground for imputing political intriguing by a senator and bank president, and corrupt conduct at that special emergency, the Court will not enquire whether the improper acts or conduct were effected by the aid of bank funds or by what other funds.

For the publication of the 5th of November, I am plainly of opinion the complainant does not stand favourably before the Court for the aid of our extraordinary interposition in his behalf.

The ordinary tribunals are open to him, as they are to all of us who are aggrieved. And his remedy for redress, or for punishment of the offender should be prosecuted there, where he will receive no doubt that favour and protection which every injured man of innocence can claim with confidence from jurors of the country.

It is not a fit case for this Court to institute. The responsibility of any proceeding to be taken, criminal or civil, must be assumed by the complainant himself.

In 1 *Chit. Crim. Law*, 860, 862, it is said that although the facts are not denied by the defendant, still, if he shew purity of intention, and negative corrupt motives, the Court may leave the prosecutor to his remedy.

I do not think the defendant was actuated by corrupt motives in publishing the first article complained of, and

in commenting upon the complainant's conduct in the manner he has done.

There were facts upon which that publication was based, and although they were freely handled, they do not so far exceed the limit which is conceded to journalists in treating of public and exciting matters, and of the conduct of public men.

The defendant has not created his facts, as is too often the case in journalism in this country; nor has he made a charge where there was no ground for it; nor has he used unnecessarily harsh or vituperative language in speaking of the complainant.

The newspaper literature of this Province has not been over nice in its language of public men, or of public events, and I am not disposed to put forth the power of Court to check such an article as this is, with the warrant and foundation there is for it, and where there is not the least reason to attribute corrupt motives to the defendant in publishing it. The parties injured may bring these actions if they please without the leave of any Court.

There are thousands of articles infinitely worse than this, and without the justification or excuse for them which this one has, which seem to be considered the current and common style of discussion or of controversy; and these have not been made the ground for application for criminal information against their authors. And, much to the credit and forbearance of the persons insulted or assailed, there have been remarkably few prosecutions of either a civil or criminal nature brought against the press of this country by those who have been really injured and aggrieved by it.

The cases of *Risk Allah Bey v. Whitehurst*, 18 L. T. N. S. 615; *Odger v. Mortimer*, 28 L. T. N. S. 472; *Hunter v. Sharpe*, 4 F. & F. 983, and *Strauss v. Francis*, 4 F. & F. 1107, shew how far persons may go in writing and in speaking of others upon proper occasions.

I think, however, that the papers of the 12th and 19th of November contain articles which are not only libellous,



but, so far as we can judge from the want of denial, or justification, or explanation by the defendant, were published without any warrant for so doing. The imputation that a senator bought up members of the Commons to defeat the Ministry of the day, and that he paid a very large sum of money for the purpose, is an offence of the gravest magnitude, And it is so far distinct from the charge contained in the publication of the 5th November, that the unfavourable opinion I have formed against the complainant upon that charge does not necessarily so affect his reputation or conduct as to preclude him from claiming the sanction of the Court for the prosecution of the other charge contained in the papers of the 12th and 19th November.

In my opinion, the rule should be discharged with costs as to the first article, and made absolute as to the charge contained in the other two articles.

MORRISON, J., concurred.

*Rule nisi in part discharged with costs, and in part absolute.*

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## REGINA V. WILKINSON.—RE HOUSTON.

*Contempt of Court—Pending trial.*

While a criminal information for libel was pending against one W., defendant wrote a letter to a newspaper, reflecting upon one of the Judges who had delivered judgment on the application for such information, and stating that W. was "as certain to be convicted as a libeller ever was before his trial." *Held*, that such letter was clearly a contempt of Court, but the defendant, on an application to commit him therefor, having made a full and unreserved apology, the proceedings were stayed on payment of costs by him, and no fine was imposed.

November 24, 1876, *McCarthy*, Q. C., moved for a rule *nisi* to commit William Houston, Esq., for contempt of Court, in the language used by him in a letter to the *Paisley Advocate* of Oct. 6th, 1876, over the signature of "Another Reformer."

The portions of the letter relied on appear in the apology made by Mr. Houston on the conclusion of the motion.

The apology was as follows :

Toronto, Nov. 22nd, 1876.

A letter appeared in the issue of the *Paisley Advocate*, of the 6th Oct., over the signature of "Another Reformer," in which the judgment delivered by the Court of Queen's Bench, on the prosecution for libel in the suit of *Regina v. Wilkinson*, and the comments of a certain newspaper thereon, were discussed. In the said letter the following sentences appeared :—

"Does it not seem somewhat remarkable \* \* \* \* that Mr. Justice Wilson, an old Reformer, quondam friend and follower of Mr. Brown's, and his colleague in the election for Toronto in 1861, should have chosen to pen a judgment which all admit to be severe, and which every lawyer in Osgoode Hall knows to be utterly unwarrantable."

Also the following :—

"There is a general feeling amongst Reformers all over the Province that it is unsafe to allow him to try a contested election case, and the leading lawyers hold the same view, and declare that it is impossible for them to get a decision in favour of a Reform candidate if there is any loophole by which he can escape giving one."

And again :—

"And yet nothing can be more certain than that Mr. Justice Wilson has kept his rod in pickle for Reformers ever since."

And again :—

"I am in a position to say that Reformers generally are not at all displeased with the raking over that Judge Wilson received (here alluding to said newspaper comments) while many Conservatives as well as Reformers, are delighted to have him shewn up in his true colours."

And also the following :

“And does he (Mr. McNeil) know that the trial in this case (*Regina v. Wilkinson*) has yet to come off; that Mr. Simpson has obtained even from Judge Wilson a criminal information on two out of three counts; that the editor of the *West Durham News* is as certain to be convicted as a libeller ever was before his trial.”

The undersigned having heard that proceedings are about to be taken against Mr. J. A. Murdoch, the then proprietor of the *Paisley Advocate*, for the publication of the said letter, feels himself bound to assume the responsibility of having used the language above set out, and has admitted that he was the writer of the said letter. The undersigned, after full consideration, feels also bound to express his extreme regret at having used the language quoted. He therefore now retracts and apologizes for the expressions so used against Mr. Justice Wilson, and expresses his sorrow at having been betrayed into using language derogatory to the Bench, and injurious to the well established reputation of Mr. Justice Wilson.

The undersigned also wishes to express his regret at having used language in relation to the suit of *Regina v. Wilkinson* which, wherever quoted, would have a strong tendency to prejudice the defence of the Editor of the *West Durham News*, and the undersigned now feels that, in justice to a person about to be put on his trial, no words should be used in the public press which could prejudice his character or his cause in the eyes of the court or country.

WM. HOUSTON.

November 25, 1876. HARRISON, C. J.—The first question is, whether William Houston ought to be adjudged guilty of a contempt of this Court; and, if guilty, the second question is, whether his written apology ought to be accepted as purging the contempt.

No one in this country undervalues the liberty of the press, but that liberty does not involve immunity from punishment for illegal publications. While the press has its privileges it is subject to responsibilities. That the liberty of the press is sometimes carried to excess cannot be denied.

It is the function of the Courts, in a proper case, to punish, and thereby restrain the excess, in other words, the licentiousness, of the press.

Nothing is more incumbent upon Courts of Justice than to preserve their proceedings from being misrepresented. Nor is there anything of more pernicious consequence than to prejudice the minds of the public against persons concerned as parties in a cause, before the cause is actually tried. Per Lord Chancellor Hardwicke, *Huggonson's Case*, 2 Atk. 469.

Any publication, whether by parties or strangers, which concerns a cause pending in Court, and has a tendency to prejudice the public concerning its merits, and to corrupt the administration of justice, or which reflects on the tribunal or its proceedings, or on the parties, the jury, the witness or the counsel, may, according to *Bishop on Criminal Law*, 5th ed., vol. ii., sec. 259, be visited as a contempt.

The offence is none the less a contempt when the attack is made on men whose office, while entitling them to respect, prevents them from replying to vituperation: *The People v. Wilson*, 16 Am. 528.

It would be strange indeed if the Judges of the Court were the only persons not protected from libels, the direct object of which is by intimidation or otherwise to interfere with the due administration of justice. See *Lechmere Charlton's Case*, 2 M. & C. 316, 323.

The phrase "contempt of Court," as pointed out by Blackburn, J., in *Skipworth's Case*, L. R. 9 Q. B. 230, 232, often misleads persons, not lawyers, and causes them to misapprehend its meaning, and to suppose that a proceeding for contempt of Court amounts to some process taken for the purpose of vindicating the personal dignity of the Judges, and protecting them from insults as individuals.

As said by the same learned Judge: "Very often it happens that contempt is committed by a personal attack on a Judge or insult offered to him; but as far as their dignity as individuals is concerned, it is of very subordinate importance compared with the vindication of the dignity of the Court itself; and there would be scarcely a case, I think, in which any Judge would consider that, as far as his personal dignity goes, it would be worth his while to take any steps. But there is another, and much more important purpose, for which proceedings for contempt of Court become necessary. When a case is pending, whether it be civil or criminal, in a Court it ought to be tried in the ordinary course of justice, fairly and impartially."

The power to punish for contempt is original with all Courts of Justice, and exercisable by Courts of Law and



Equity alike. See *Ex parte Jones*, 13 Ves. 237; *Littler v. Thomson*, 2 Beav. 129; *Felken v. Herbert*, 10 Jur. N. S. 62; *Tichborne v. Mostyn*, L. R. 7 Eq. 55, note; *Regina v. Castro* otherwise *Orton*, L. R. 9 Q. B. 219; *The People v. Wilson* 16 Am. 528.

*Regina v. Wilkinson* is still pending in this Court. There can, we think, be no doubt that Mr. Houston, in publishing the letter which he did in the columns of the *Paisley Advocate*, dated 5th October last, was guilty of a contempt of this Court.

His written apology for the publication is very full. It is much to his credit that he has taken this step. No man who does a wrong is to be regarded as lacking in courage because as soon as possible he endeavours to make atonement for the wrong which he has done.

The question now is, whether this letter of apology—full and frank as it is—should be accepted by the Court under the circumstances, as purging the contempt.

In *Martin's Case*, 2 R. & M. 647, note, a person writing a letter to the Lord Chancellor relative to a threatened suit, and enclosing a bank note, was held guilty of contempt, and ordered to attend personally and shew cause why he should not be committed, but afterwards, on his appearing and expressing his contrition he was discharged on payment of costs.

In *Lechmere Charlton's Case*, 2 M. & C. 316, time was allowed for a full apology.

In *Felken v. Herbert*, 10 Jur. N. S. 62, on the making of the apology and on payment of the fees and costs of the application to commit, the defendant was discharged from custody.

In *Regina v. Castro*, otherwise *Orton*, L. R. 9 Q. B. 219, the Court, notwithstanding full apologies on the part of Messrs. Onslow and Whalley, considering their position in society, and the evil example to the community, imposed considerable fines.

While entertaining no doubt as to our power to fine Mr. Houston, notwithstanding his apology, we do not deem it necessary that we should take that course.

At the same time we do not think it right that the applicant, who has good cause to complain of Mr. Houston's letter, as calculated to prejudice him at the trial, yet to take place, and who has had the trouble and expense of bringing this matter before the Court, and who in doing so has done no more than his duty, should suffer loss.

All further proceedings against Mr. Houston should be stayed on payment by him to the applicant of the costs of this application, to be taxed by the Master—such payment to be made within two weeks after taxation.

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## REGINA V. WILKINSON—RE BROWN.

*Pending trial—Publication calculated to prejudice—Contempt of Court.*

Where leave to file a criminal information for libel had been granted on the 29th June, and one B., on the 8th July, published an article tending to prejudice the fair trial of the person against whom such information was to issue : Per HARRISON, C. J., there was a pending litigation, though the information had not been filed, and such publication was a contempt of Court.

The information was filed late in Trinity term, and the subpoena served on the applicant (the defendant in the information) on the last day of that term. Per HARRISON, C.J., an application in Michaelmas term to attach B. for the publication of the 8th July, was not too late.

*Quære*, whether the motion could have been made before the filing of the information.

*Semble*, that a Judge sitting out of term under the A. J. Act, does not represent the full Court, so as to enable him to punish for a contempt of such Court.

B., in the article complained of, which appeared in a paper of large circulation and considerable influence, spoke of the applicant (the defendant) as the author not only of the libels for which the information had been granted, but of scores of others against the same person. Per HARRISON, C.J., this was calculated to prejudice the applicant in his trial.

The applicant had, in a newspaper published by him, spoken of the article in contemptuous terms, and as one which he felt certain would fail of its intention to prejudice his case in Court in the least. Per HARRISON, C.J., the applicant's belief as to the effect of the article was no answer to this application, the question being, whether it was calculated to have the effect of prejudicing his trial.

It was objected also, that the applicant himself had in his paper commented on the judgment of the Court, and distorted its meaning, and had himself continually attacked and libelled B. Per HARRISON, C.J., this was no answer to the application, for the article in question was one scandalizing the Court, not the applicant only, and had been justified by B, in argument, and the offence was therefore not against the applicant, but against the Court.

The article, which is set out below, was held to be clearly a reckless, intemperate, and unjustifiable attack upon a Judge of this Court for a judgment pronounced by him with the other Judges, and a contempt therefore of the Court.

MORRISON, J., was of opinion, 1. That the application, so far as it respected the applicant himself, was too late ; 2. That he had failed to sustain the constructive contempt founded on the allegation that the article was calculated to prejudice him on his trial ; and, 3. That having so failed, he was not, under the circumstances, entitled to ask the Court to punish the author, at his suggestion, for the direct contempt of the Court, contained in the article published so long ago, and which the Court itself had not deemed worthy of notice.

WILSON, J., took no part in the judgment ; and the Court being equally divided the application dropped.

IN Michaelmas term, November 27, 1876, *McCarthy*, Q. C., for the defendant, John A. Wilkinson, obtained a rule calling on the Honourable George Brown, the managing director, and printer and publisher of the *Daily Globe* newspaper and the *Weekly Globe* newspaper, both published in the city of Toronto, to shew cause why a writ of attachment should not issue against the said George Brown, or why he should not be committed for contempt of this honourable Court, for printing and publishing in the issue of the said *Daily Globe* newspaper of the 8th day of July, 1876, and in the issue of said *Weekly Globe* of the 14th day of July aforesaid, an article or articles under the caption of "Justice Wilson on the War-Path," and wherein is a description, or argument, or comments on the judgment of this honourable Court, and especially of that of his Lordship Mr. Justice Wilson, on the application of the prosecutor, (Hon. Mr. Simpson) against the above named defendant, for a rule to permit the said prosecutor to file a criminal information in this honourable Court for certain alleged libels published by the defendant respecting the said prosecutor, and in which said article the said Honourable George Brown has been guilty of a contempt of this Court, or of a contempt of this Court in scandalizing this honourable Court in calumniating and vilifying the above named defendant, and in so commenting on the said matter in a manner to prejudice, and that does prejudice, the public before the trial of this cause, and so as to prevent the defendant from obtaining a fair and impartial trial on the charges of libel for which he is to be tried—upon reading the newspaper aforesaid, and upon grounds set forth in the affidavits of John A. Wilkinson, Arthur E. Gilbert, Edward Sidney Smith, Henry O'Brien, and Russel Wilkinson, this day filed, and the affidavits of Alexander McNeil, John A. Murdock, William Collins, David Roberts, and S. S. McCall, filed herein on the twenty-fourth instant, and now re-filed, and the papers and exhibits annexed to said affidavits; and on grounds disclosed in other affidavits and papers filed.

The affidavit of John A. Wilkinson filed on taking out the rule, stated the facts as to the issue of the rule for the



criminal information; verified the articles in the *Daily and Weekly Globe*, and stated that the Globe Printing Company was a company incorporated under 29-30 Vic. ch. 123, and that the Honourable George Brown was the managing director. It also stated that the *Daily and Weekly Globe* had a large circulation in all Ontario and in the united counties of Northumberland and Durham, in which united counties the information was laid, and that according to his belief the articles in question had been widely read. The twelfth and thirteenth paragraphs were as follows :—

“12. That the matter of the said articles touch upon at least one of the said alleged libels with which I now stand charged; and upon the information since filed in relation thereto, and from what has come to my knowledge since the publication of the said article in said *Globe* newspaper, they will have a tendency to prejudice, and will, I verily believe, prejudice me in my said trial on the said information.

13. That at the time of the publication of the said articles in the *Globe* newspaper of the 8th and 14th days of July last my legal adviser was in England, and did not return to Toronto until the beginning of this month, a few days before Trinity term rose, and owing to that fact, and owing to my having been almost continually absent from home on matters connected with my business since about the first day of August to this present time, I had no opportunity of consulting him in reference to said articles, so as to be able to decide upon what action should be taken in reference thereto.”

In the fourteenth and last paragraph he stated that the subpoena to answer the criminal information had been served on his attorney on the 6th September, but that he did not receive it till the 9th, as he was temporarily absent from home on business. The affidavit was sworn on the 28th September.

The criminal information was also filed on the application, and the affidavit made by Wilkinson on the application for the criminal information was re-filed. See *ante* p. 10.

The affidavit of McNeil, referred to in the rule *nisi*, was one made in the *Houston Case*, *ante* p. 42, and re-filed

on this motion. It shewed that the letter in the *Paisley Advocate* was written by William Houston, and that he, Houston, was a sub-editor of the *Globe*. The affidavit of Murdock was to the same effect.

The affidavit of H. O'Brien, Esq., stated that the letter written by the Hon. George Brown to Mr. Simpson, dated 15th August, 1872, and set out *ante* p. 11, was intended to be relied on by the defendant at the trial of the information, and was deemed by the defendant's advisers very important evidence in support of his defence. Russell Wilkinson proved the purchase from the Globe Printing Co. of papers of the 8th and 14th July respectively, containing the article complained of.

On shewing cause Mr. Brown filed the following affidavit :—

1. I say that in the discharge of my professional duty as a journalist I wrote the article complained of in the *Daily Globe* of 8th July, 1876, and the article in the *Weekly Globe* of 14th July, 1876.

2. I say that it was with much reluctance, and only after mature consideration, the determination was arrived at to deal with the language of Mr. Justice Wilson through the columns of the *Globe*; and that it would have been passed in silence had that course appeared possible without desertion of duty to high public interests, or with justice to this deponent, who, though neither a party nor a witness in the cause then before the Court, and debarred from defending himself in Court, had been assumed by Mr. Justice Wilson—and that on a preliminary application as to the particular form in which judicial redress for a specified wrong might be obtained—to have written a letter of most corrupt tendency, and had been assailed in language that could hardly have been stronger had it been directed against a convicted criminal. I further say, that the said articles were not written with any view of prejudicing the said Wilkinson on his trial.

3. I further say that the articles complained of were not intended to be written, and were not written, in contempt of the Court of Queen's Bench; that I am and always have been deeply impressed with the importance of maintaining the authority and dignity of the judicial tribunals of our country—and have zealously striven to impress this on the public mind. I say that the *Globe* has been published for thirty-three years, and has all that time taken a leading part in the discussion of public questions, including the administration of justice, and frequently under circumstances of great popular excitement—but not in one instance until now has anything published in its columns been made ground of complaint in a Court of Justice as being in contempt of Court or derogatory to the dignity of any such tribunal; and I say that the following language is part of the very articles complained of—is in harmony with the language of the *Globe* since its establishment—and is, as I respectfully submit, a complete answer to the charge of having desired to bring the Court into contempt :—

The manner in which the judicial system of the Province of Ontario is, as a whole, administered is worthy of the highest admiration. Justice

is ably and uprightly dispensed among us. The judges but rarely deviate from that wise reserve of speech and temper which gives dignity to their office and creates public confidence in their decisions. All classes of the community, consequently, have implicit faith in the Judiciary; and rare indeed is the occasion when the public journalist feels constrained to criticise with severity the utterances of an occupant of the Bench. Indeed, so sensitive for the good name and fame of the Law Courts of the Province has the press as a rule been, that it may be doubted whether on some occasions things have not been allowed to pass in silence that in the interest of the people might profitably have been treated with sharp criticism. \* \* \* \*

Now with this decision of the Court we find no fault. Doubtless it was arrived at after a careful examination of the evidence submitted, and is in accordance with legal usage. It is with what followed the pronouncing of this decision by the Chief Justice that we have to do at present.

Chief Justice Harrison pronounced the judgment of the Court on this application, which was the unanimous finding of the three Judges. The decision was, that a criminal information should be filed against Mr. Wilkinson for the publications of 12th and 19th November, and that as to the publication of 5th November, a sufficient case had not been made out to warrant that step."

4. I say that shortly after the General Election of 1872, it became known that very large sums of money had been received by members of the then Government of the Dominion of Canada from parties to whom the said Government had just made an improvident concession for the construction of a Railroad connecting the existing Railway system of Canada with a Port on the Pacific Ocean; that from the Report of the Royal Commission appointed by Government to inquire into the said matter, it appears that Sir John A. Macdonald gave the following evidence before that Committee:—

"When Sir George Cartier and I parted in Ottawa, he to go Montreal and I to go to Toronto, of course, as leading members of the Government, we were anxious for the success of our Parliamentary supporters at the elections, and I said to Sir George that the severest contest would be in Ontario, where we might expect to receive all the opposition that the Ontario Government could give to us and to our friends, at the polls. *I said to him you must try and raise such funds as you can to help us, as we are going to have the chief battle there.* I mentioned the names of a few friends to whom he might apply, and Sir Hugh Allan amongst the rest, and that he was interested in all those enterprises which the Government had been forwarding. When, therefore, I ascertained that Sir George had put it all right with his friends, I then communicated to my friends in Montreal, Sir George Cartier and Mr. Abbott, stating *I hoped they would not forget our necessities; that they would see to raise some funds for us in Ontario.*"—EVIDENCE OF SIR JOHN A. MACDONALD, p. 104.

5.—From the same Report it also appears that a letter from Sir Hugh Allan to General Cass, dated 7th August, 1872, was proved in evidence, from which the following is an extract:—

"It is unnecessary to detail the various phases through which it passed, but the result is that we yesterday signed an agreement by which, on certain monetary conditions, they agree to form the company, of which I am to be President, to suit my views, to give me and my friends a majority of the stock, and to give the company so formed the contract to build the road, on the terms of the Act of Parliament, which are \$30,000,000 in cash, and 50 millions acres of land, with all other advantages and privileges which can be given to us under the Act, and they agree to do everything in their power to encourage and assist the company, during the whole period of construction. The final contract is to

be executed within six weeks from this date—probably sooner \* \* \* security, but will be returned, I think, as soon as the work is fully begun. The expenses incurred in bringing the matter to this point have been very great. *I have already paid away about \$250,000 and will have to pay at least \$50,000 more before the end of this month.* I don't know that even that will finish it, but I hope so."—LETTER FROM ALLAN TO GEN. CASS, 7TH AUG., 1872, p. 208.

6. In the examination of Sir Hugh Allan before the said Royal Commission, the following evidence was made :—

"*Private and Confidential.*

"Montreal, 30th July, 1872.

"DEAR SIR HUGH,—The friends of the Government will expect to be assisted with funds in the pending elections, and any amount which you or your Company shall advance for that purpose shall be recouped to you.

"A memorandum of immediate requirements is below.

"Very truly yours,

(Signed) "GEO. E. CARTIER."

"NOW WANTED.

"Sir John A. Macdonald .....	\$25,000
"Hon. Mr. Langevin .....	15,000
"Sir G. E. C. ....	20,000
"Sir J. A. (Add'l) .....	10,000
"Hon. Mr. Langevin .....	10,000
"Sir G. E. C. (add'l) .....	30,000

"Question—Have you got that letter in your possession ?

"Answer—I have, and I hereby produce it before the Commission, but do not wish to dispossess myself of it; an authentic copy is herewith produced and filed marked "S."

"As the letter now appears, the memorandum is for \$110,000, but at the time it was written the three first items amounting to \$60,000 only were mentioned. Sir George said, however, that they could talk of that afterwards. Accordingly I paid over the three first sums of money to the gentlemen indicated. Afterwards Sir George requested me to send a further amount to Sir John A. Macdonald of \$10,000, and \$10,000 to Mr. Langevin and 30,000 to the Central Committee of Elections, and the three sums last mentioned in the memorandum appended to the letter were then added to it by Sir George. I accordingly remitted \$10,000 to Sir John Macdonald, \$30,000 to the Central Committee, and left \$10,000 with Mr. Abbott for Mr. Langevin, to be paid upon getting from that gentleman a receipt for it. In Sir George Cartier's letter of the 30th July, namely, the one to which I have secondly alluded, there is an undertaking on the part of Sir George that my advances would be paid back to me. I did not see well from what source this money could be repaid, but Sir George held out some hope that his political friends would contribute to make it up. Beyond this there was nothing that I can recall as to the manner of repayment. On leaving Sir George I said to Mr. Abbott, that I saw no possibility of my ever being repaid these contributions. Neither then nor on any other occasion had I any correspondence with Sir George as to the repayment of these sums.

"I left Montreal for Newfoundland I think early in August, and only returned at the end of the month, and except by infrequent telegrams I had no communication with Montreal during that time. Among these telegrams I had two from Mr. Abbott informing me that Sir George wanted \$20,000 more for the General Committee, and \$10,000 for Sir



John. I authorized Mr. Abbott to pay over these sums, and placed the money at his disposal.

"I think I also received telegrams from Mr. Abbott telling me that Mr. Langevin would sign no receipt and asking my authority to hand him the money without any receipt.

"This last telegram did not reach me in time to be acted upon, and I have since learned from Mr. Abbott that Mr. Langevin gave no receipt.

"I heard of Sir George's defeat while in Nova Scotia on my way back. In this way on my return I found that the limits of payments which I had first agreed to had been exceeded, and with subsequent advances they finally stood as follows:—

To Sir George E. Cartier's Committee .....	\$85,000
To Hon. Sir John A. Macdonald towards election expenses in Ontario .....	45,000
To Hon. H. L. Langevin towards electoral expenses in Quebec ....	32,600
	<hr/>
	\$162,600

"I also paid for the assistance of other friends of my own in connection with the elections between \$16,000 and \$17,000.

"These sums, with the preliminary expenses on the Pacific and various railroads in which I was engaged, more or less directly connected with the Pacific enterprise, made up the amount of my advances to about \$350,000."  
—EVIDENCE OF SIR HUGH ALLAN, p. 138-39.

7. I say that the evidence before the said Royal Commission left no possible ground for doubt that these vast sums of money so obtained from the Contractors for the Pacific Railway were expended in carrying the elections, and I say that the strong feeling aroused thereby throughout the country caused the Government to resign office.

8. I say that many of the newspaper organs and public speakers of the Conservative party, on the retirement of their leaders from office in consequence of "the Pacific Scandal," commenced personal attacks on members of the Liberal party, and sought especially to find against them such accusations as might be represented as in some sense offsets to the conduct of the Conservative leaders in the Pacific Scandal; that the *West Durham News*, of which the said J. A. Wilkinson is publisher, took an active part in these attacks and carried on continuously and systematically for weeks bitter and personal assaults on the conduct and character of the Hon. John Simpson, of Bowmanville, a Senator of the Dominion.

9. I say that these accusations of the *West Durham News* against the Hon. John Simpson were copied far and wide by the public newspapers of the Dominion, were discussed editorially *pro* and *con* in the freest manner, and had become part of the politics of the country, before Mr. Simpson's complaint against Mr Wilkinson had been pronounced upon by the Court of Queen's Bench.

10. I say that the Judgment of the Court of Queen's Bench in *The Queen v. Wilkinson* was delivered on the 29th June, 1876—and not till the 8th July following was one word of criticism on the said judgment published in the *Globe*.

11. I further say that on the 29th June, 1876, when the said judgment was delivered, elections for members to represent the Counties of South Ontario and North Ontario in the Dominion Parliament were proceeding; and that in the speeches made by politicians at the meetings of the Electors connected therewith between that date and the publication of the article of the *Globe* on the 8th July (as I had then been informed and verily believed), as well as in the opposition newspapers, the strong

language applied by Mr. Justice Wilson to the Hon. John Simpson and this deponent was systematically used by the opponents of the Government as a political weapon, to the detriment of the Liberal Candidates and the injury of Mr. Simpson's cause.

12. I further say that in the meantime the judgment was being used for party purposes in his paper by Mr. Wilkinson and the political party to which he belongs, and that in his said paper, the *West Durham News* of the 30th June, 1876—eight days previous to the publication in the *Daily Globe* now complained of—the following article appeared under the title of “BIG PUSH TRIAL:”—

“By telegraph from Toronto, we learn, just upon going to press, that the rule asked for by the Hon. John Simpson, calling upon us to shew cause why a criminal information should not issue against us, was refused with costs on the first count, the Court holding that the charge of political intriguing was sustained; Justice Wilson declaring himself astonished that Mr. Simpson could say he was not ashamed of his circular to electors in South Ontario. On the other two counts the Court has allowed him to proceed to require us to prove whether he was guilty of the purchase of members of Parliament, and of sending money to the Township of Clarke for corrupt purposes. The result places the case now in a fair way for trial. We opposed the rule, not upon grounds to prevent a trial, but to cause Mr. Simpson to bring a civil suit. Mr. Simpson's application was for a criminal trial, in which the country will have to pay the cost of the Court, in any case, and we will have to pay the cost of our witnesses, whether the verdict is in our favour or not. With a civil suit we should have contended with Mr. Simpson, and not with the Queen. There would have been no difference between us before the Courts, and the loser would have been mulcted in the cost. We think every fair thinking man will say we were right in this contention; however, we failed to prevent the rule issuing, and now for the fight. As we showed in our affidavits before the Court, we made those charges believing them to be true, and without malice, and should the case be brought to trial next fall or at any time, we will appear with confidence, believing that the result will shew that we knew whereof we spake. The country will watch this case with a great deal of interest, as it is one of public importance.”

13. I say that in the said newspaper of the said John A. Wilkinson of the 7th July, 1876—the day previous to the article complained of in the *Daily Globe*—there appeared the following article, under the title of “THE BIG PUSH LETTER—A SEVERE JUDGMENT,” with the words italicised as herein appears:—

“It is of course a plain demand for money, to oppose, it is said, the expenditure by the Government candidates at the Toronto elections, and it is an admission that the writer and those co-operating with him had expended their strength, which I suppose means their money, in other constituencies for the like purpose. *It is a letter written for corrupt purposes, to interfere with the freedom of elections. It is an invitation to the recipient, as one with some others and the writer, to concur in committing the offence of bribery and corruption at the polls.*”—Mr. Justice Wilson on the “Big Push” Letter.

“It is not often that we find such strong words as these in the judgment of a Court of law. Mr. Brown and his friends have sought to impress upon the public that his letter to Mr. Simpson, urgently pleading for money to expend in the elections of 1872, was one of trifling consequence—that it only asked for a contribution to a small Central Fund which had been used in perfectly justifiable and legal ways. The absurdity of this pretence has long since been demonstrated. There was no room at the time when Mr. Brown wrote to the President of the

Ontario Bank for money for its expenditure in a legitimate manner. It was just on the eve of polling. The money could only be expended in flagrant bribery—in buying up voters at the polls. The sham pretence of the chief offender and his allies had no weight with the Court of Queen's Bench. 'It is a letter,' says the Court, 'written for corrupt purposes. It is an invitation \* \* to concur in committing the offence of bribery and corruption at the polls.' If there were any sturdy 'Reformers' still unwilling to regard their ancient chief as the founder of a bribery fund, and as its distributor in those places 'where it would do most good,' it is impossible for them to remain any longer on the 'ragged edge.' The judgment of the Court of Queen's Bench will at all events have weight with them. And it is a judgment, too, from which there is no appeal. Mr. Brown fittingly takes his place in the ranks with Messrs. Walker, Cook, Jodoin, Norris, *et al.* 'Come along, John, and put down bribery and corruption; we've lots of money.'"

14. I further say that an article in precisely the same terms had appeared in the *Toronto Mail* of the fourth July—four days before the date of the *Globe's* article.

15. I say that between the delivery of the said judgment on the 29th June, 1876, and the publication in the *Globe* of 8th July now complained of, a very large number of the newspapers of the Province contained articles strongly commenting on the language used by Mr. Justice Wilson in the *Queen v. Wilkinson*, either favourably or adversely, many of the opposition newspapers using the said language of Mr. Justice Wilson in aid of violent political and personal assaults on Mr. Simpson and this deponent, and through them on the Reform Party; and as examples I take the following extracts from articles of leading Conservative papers:—

From the *Kingston News* of 5th July, 1876.

"The judgment of Judge Wilson, from which we quoted yesterday, must prove very galling to the leader of the Reform Party, the Hon. George Brown, author of the big-push—grand stand—come down handsomely, will you be one? letter, and equally annoying to the Hon. John Simpson, President of the Ontario Bank, the author of the celebrated South Ontario circular of 1874. Both gentlemen are stars of the first magnitude in the constellation of Gritism; each in his way is a model Reformer; and each in his sphere is a denouncer of Tory corruption. What would the Hon. George Brown not give to-day if that Big Push letter, which told the tale of how the Reformers of Toronto had 'exhausted their strength in aiding the out-counties,' and therefore it was necessary to find a certain number of wealthy men who could afford to 'come down handsomely,' had never seen the light of day? To see its contents in print staring him in the face frequently, must be a source of trouble to the distinguished champion of political morality. The criticism of the Tory Press was bad enough, but if Mr. Brown could afford to treat with comparative contempt, as he has been so long subjected to Tory attentions, but to have paraded in the columns of the Press a judgment from the Bench, in which his corruption is exposed as follows—and we quote from Judge Wilson again—is truly 'the unkindest cut of all':—

'It is of course a plain demand for money to oppose, it is said, the expenditure by the Government candidates at Toronto elections, and it is an admission that the writer and those co-operating with him had expended their strength, which I suppose means their money, in other constituencies for the like purpose. *It is a letter written for corrupt purposes, to interfere with the freedom of elections. It is an invitation to the recipient, as one with some others and the writer, to concur in committing the offence of bribery and corruption at the polls.*'

"We can easily imagine the dictator-in-general of the only clean-



handed politicians in the country, after reading the opinion of the Court, pacing the room and indulging in a soliloquy on the folly of committing bribing appeals to paper, and wishing that the unfortunate letter had never been written. But what's done cannot be undone, and Mr. Brown's sin having been found out, he must, however unpleasant, stand the consequences.

"Considering the position he occupies, Judge Wilson's comment on the Hon. John Simpson's intriguing, as President of a Bank, in political matters cannot fail to cause the worthy author of the South Ontario circular of 1874 some dissatisfaction. Said the Judge :—

'A letter expressing such sentiments, and spread broadcast throughout the Riding for election purposes, might well be called political intriguing, and a public writer would not be going beyond the proper limits of fair criticism if he spoke of it plainly as of that character. In addition to that, the letter which the complainant received from Mr. Brown must also be considered. *It has acquired a political notoriety from the position of the parties concerned, and from the directness of its purpose, the peculiar force of its appeal, and the ordinary and business-like manner in which it treats it as perfectly legitimate to apply money on the polling day upon any electoral crisis. \* \* \* I confess that it appears to me that the charge of political intriguing is very reasonably made out.*'

"No other conclusion could be arrived at, and if all that transpired were only known, it would be discovered that Mr. Simpson went much further than merely writing his circular. If the screen were only drawn aside, and the facts published in reference to the intimacy between the controller of the funds of the Dominion and the Manager of a Bank, the country might learn the exact terms agreed upon which induced the latter to point out the advantages to be derived by 'our Bank' if the Government candidate were supported. However, enough has been made in Mr. Simpson's case to warrant the Judge on the Bench giving him a lecture on his misconduct, which, it is to be hoped, he did not repeat during the campaign which will come to an end this evening.

"The lecture read from the Bench to the virtuous Party of Reform during election trials throughout the country would make an interesting volume, which the party should immediately publish for the benefit of future generations, and among the most important of the judicial utterances is that of Judge Wilson in reference to the doings of the Hons. George Brown and John Simpson."

From the *Toronto Mail*, of 30th June, 1876.

Judgment was rendered yesterday in the Queen's Bench, in the case of the *Hon. John Simpson v. J. A. Wilkinson*, editor of the *West Durham News*, granting a rule for criminal information against defendant on the charges relative to the purchase by plaintiff of Senators and members of Parliament, but refusing it on the charge of general corruption, grounded on plaintiff's circular to the Ontario Bank shareholders. Justice Wilson, in delivering judgment, said that the circular fully justified the charge of political intriguing, and expressed astonishment that a gentleman of plaintiff's standing should assert that there was nothing to be ashamed of in it. This is a nice compliment from the Court to the Grit party, and yet in the very Riding where this infamous "political intrigue" was conceived and consummated, our model Ministers are busy "elevating the standard of political morality."

From the *London Free Press*, 1st July, 1876.

"GRIT MORALITY REBUKED.—At the previous election in South Ontario Senator Simpson—to whom Senator Brown applied to 'come down handsomely' in the cause of corruption—interfered in a most unwarrantable



manner with the liberty of the franchise. Being the head of a monetary institution which was the depository of a large amount of Government funds, from which large profits were derived and himself enriched, he sent the following circular letter to bank customers :—

\* \* \* \* \*

“The consequence was, that the late Mr. Malcolm Cameron was elected by a majority of 151 votes. It is no wonder that in the face of such a document Mr. Justice Morrison should have recently, from his place on the Bench, administered a sharp rebuke to this Senator Simpson, one of the leading spirits of that party that declared its mission to be ‘to elevate the standard of morality’ among the people.”

16. I say that the said *West Durham News*, of which the said J. A. Wilkinson is publisher, has frequently and systematically, since the judgment of the Queen’s Bench on the 29th June, 1876, contained articles of the most abusive character against the Hon. John Simpson or this deponent, or both of them, based on the language of Mr. Justice Wilson on the said occasion—in proof of which I refer to the articles therein of July 14th, 1876, entitled “*The Globe and the Bench*”; of July 21st, entitled “*Mr. Brown’s attack*”; of July 28th, entitled “*Mr. Brown’s attack, the other side*”; of August 4th, entitled “*Grit Despotism*”; of August 18th, entitled “*The Big Push Fund*”; of September 1st, entitled “*The Globe on the Big Push Suit*”; and many other similar articles.

17. I say that among these said articles published in the said *West Durham News* was one, entitled “*Standard Elevators*,” in the number of 24th November, 1876—only three days before the filing of the present application by the said J. A. Wilkinson against me—which article was intended, as I verily believe, to affect me injuriously before the Court in the present application; and that from the said article the following extract is taken :—

“At the close of that election” (meaning the General Election of 1867) “the editor of this paper happened to be at Dunnville, at the house of Dr. Hopkins, when a young man by the name of John R. Miller arrived there. This Mr. Miller was bookkeeper for the Hon. George Brown on his Bothwell property; a good moral young man; was studying for the ministry of the Presbyterian Church, and has since been ordained and is now preaching in that Church. This Mr. Miller told Dr. Hopkins, senr., and Dr. Hopkins, jr., in our hearing, in Dr. Hopkins’s parlour, ‘that he had been to South Ontario; taken there by Mr. Brown to pay out money for him, and that he had paid \$27,000 out of Brown’s own money for corrupt purposes during the election.’ That was the beginning of the elevating of the standard by systematic corruption in this country.”

“In 1872 this same ‘elevator’ while denouncing corruption most vehemently was spending his spare hours in writing ‘Big Push’ letters to the faithful, and did secure and did manipulate an immense sum of money which was largely spent corruptly; the country being debauched in almost every constituency, with his consent and countenance.”

18. I say that this story as to the election of 1867 is a pure fabrication. I never had a bookkeeper on my Bothwell property of the name of John R. Miller, or of the name of Miller; I have no recollection of ever knowing any person of the name of John R. Miller anywhere, or of having ever known any one at Bothwell of the name of Miller; I know no Presbyterian or other minister of the name of Miller; I never took any person of the name of Miller, or of any other name, to South Ontario, at the election of 1867, to pay out money for me; and I further say that the entire amount expended by me at the said election in South Ontario in 1867 did not amount to one-eighth part of twenty-seven thousand dollars.

19. In regard to the affidavit of the said J. A. Wilkinson in this appli-

cation, sworn to on the 28th day of September, 1876, and filed on the 27th November, 1876, I say that the only allegation which I find in it on which he claims the action of the Court on his personal account is that contained in the 12th paragraph, in which he says, that "matter of the said articles," (meaning the articles in the *Daily Globe* of 8th July, and *Weekly Globe* of 14th July last,) "touch upon at least one of the said alleged libels with which I now stand charged." I say that I find it difficult to meet a charge of so ethereal a character as that "some words in a four column article, not stated and not known, 'touch upon' at least one of two libels—which one of them, or what part of it, not being stated and not being known by this deponent."

20. I say, that I have carefully perused the Criminal Information against the said J. A. Wilkinson, now *sub judice*, and find that the alleged libels for which he has to answer are solely contained in the two following extracts from articles said to have been published in the *West Durham News* :—

1. "The party referred to by us, as the head of a public institution, who purchased three votes at the time of the crisis, is the Hon. John Simpson, President of the Ontario Bank. Our evidence in the case was secured in this way. Mr. Simpson boasted to different persons, without ever asking if they would accept of the confidence, of having bought those votes, and paid as high as \$30,000. We at first doubted the truthfulness of the boast, and looked upon it simply as a bit of swagger. Finding, however, that the same story had been repeated by him, we were at last lead to institute a search, knowing that if Mr. Simpson bought three at such prices, more had been purchased, which was rewarded in the substantiation of the fact of the purchase by Mr. Simpson and others named in our charge by other parties."

2. "Senator Simpson has telegraphed to the *Ottawa Free Press* that he never spent a dollar in his life to purchase or secure a vote of a member or an elector on behalf of himself or any other party. Tell that to the Marines. Who sent the \$2000 to Clarke at the time of the Blake-Milne election? And who is it that still holds a claim of \$800 for money spent at that time? Were we allowed so wide a scope as to prove that Mr. Simpson had been guilty of corruption we should have no trouble in fastening an abundance of it upon him. Indeed, we are compelled to look upon him as one of the most corrupt men in Canada. But our charge at this time is, that he bought up members of the Commons to defeat Sir John A. Macdonald's Government in the time of the Crisis in 1873, and we are not going to let side issues or general statements draw attention from this one fact."

21. I say further that the said J. A. Wilkinson, in an editorial of his newspaper of 30th of June last, hereinbefore quoted, defined the sole issues to be tried, on the said criminal information against him, to be "whether he" (meaning the said Hon. John Simpson) "was guilty of the purchase of members of Parliament, and of sending money to the Township of Clarke for corrupt purposes."

22. I say that the matter of these two alleged libels is not commented upon in any way in the articles of the *Daily Globe* of 8th July, or the *Weekly Globe* of 14th July; that the strictures contained in the said articles are confined exclusively to the matters involved in the other alleged libel, as to which Mr. Simpson was refused a Criminal Information, and which, as I am advised and submit, ceased from that moment to be *sub judice*; and I respectfully submit that no contempt of Court can possibly have been committed by the said articles, of which the said J. A. Wilkinson has the right to make complaint on his own personal account.

23. I further say, that the statement of the said J. A. Wilkinson, in the 12th paragraph of his said affidavit of 28th September, that the strictures contained in the *Globe's* said articles of 8th and 14th July will, by touching in some way that is untold upon something that is also untold, prejudice him in his trial on the Criminal Information, has been contradicted by repeated statements of his own journal, the said *West Durham News*. The following are extracts from the editorial article of that paper of July 14th, 1876 :—

“Of one thing we feel certain, the wicked and foolish article referred to will fail of its intention to prejudice our case in Court in the least, while it will (meaning one of the said articles in the *Globe* now complained of) greatly help it before the country, so that on that head we should have no fault to find with it.”

And the following is an extract from the editorial article of the same paper of 21st of July last :—

“Rumour has it, that at a meeting of the Law Society it was decided to take steps to punish Mr. Brown for his impudent article. The rumour lacks substantiation, and we should judge that likely the thing will be treated with silent contempt.”

And the following is an extract from the editorial article of the same paper of the 28th July last :—

“We would not like to see a heavy fine imposed upon Mr. Brown, and he made to appear before his party as a martyr, but we should like to hear what his legal adviser would say in answer to a rule to shew cause why an information should not issue against him for contempt of court, and if his grounds are not sufficient, a fine of one shilling imposed. It is all he could afford.”

24. With reference to a certain application which I am informed and believe was made in this Court by the said John A. Wilkinson during this present term, against Mr. Wm. Houston, for contempt of court in writing a certain letter in a newspaper called the *Paisley Advocate*, I say that until the 27th day of the month of November, 1876, and until after the judgment of this court had been given on that day, I was totally unaware that Mr. Houston had either written the said letter or any letter to the *Paisley Advocate* or to any other paper in reference to the matter *Regina v. Wilkinson*, or had been called upon to shew cause in this case in respect thereof, or had apologised.

25. I say that the *Globe* Printing Company had no knowledge of or connection with the said letter of the said Wm. Houston whatever, and that it was no part of his duty as an employee of the said Company to write said letter or any letter to the *Paisley Advocate*, or to any other paper.

26. I am aware that at the General Elections for the Canadian House of Commons, which took place in the year 1872, there was a General Election Fund for promoting in a legal and proper manner the political interests of the Reform Party of the Province of Ontario ; I have a personal knowledge of the extent and objects of that fund, and of the manner of its application ; and I say that the entire amount of the said General Election fund was less than thirty-eight hundred dollars, and consisted entirely of voluntary subscriptions from members of the Reform Party ; and I say further, I have no doubt whatever that this was the only General Election Fund of the Reform Party for the Province of Ontario at the said General Election of 1872, as I never heard of the existence of any other such fund, and had any such existed I am sure I must have known it.



27. I say that the said fund was raised for the purpose of promoting the success of the Reform party in various constituencies at the said election, by defraying the travelling expenses of public speakers, by printing and circulating political documents, by assisting to pay the legal and necessary expenses of candidates, unable to bear the lawful expenses of election contests, and by aiding in similar necessary and lawful expenditures.

28. I say that no part of the said fund was asked or contributed for corrupt or any other illegal or immoral purpose ; that those who apportioned it paid out no part thereof for corrupt or any other illegal or immoral purpose ; and that so far as I know and believe, no portion of the money was applied to any such purpose by those to whom it was apportioned.

29. I say that the letter written by me on 15th August, 1872, to the Hon. John Simpson, requesting him to subscribe to the said General Election Fund, and which was commented upon by Mr. Justice Wilson in his judgment of 29th June, 1876, was one out of either three or four similar letters written by me to personal and political friends ; that no other such letter, and no other letter of any description, was written by me requesting subscriptions to the said General Election Fund of 1872, or to any other political purpose at that election ; that I have no knowledge of any letters having been written by anybody requesting subscriptions to the said fund, except the said three or four which were written by me, and I do not believe that any were written.

30. I say that the Hon. John Simpson did not contribute anything to the said General Election Fund in response to my letter, or in any other way, and that the entire amount sent or received in response to the said three or four letters written by this deponent was either \$122 or \$123. And I say further that the largest amount I hoped to receive from Mr. Simpson in response to my letter was one hundred dollars.

31. I say that my said letter to the Hon. John Simpson was not written for corrupt purposes—was not written to interfere with the freedom of elections—and was not an invitation to anybody to commit the offence of bribery and corruption at the Polls. I say that it was, on the contrary, simply an application for a reasonable subscription from a member of the Reform party towards maintaining the efficiency of his political party, and thereby promoting the cause of good government.

32. I say that the urgent tone of my said letter to Mr. Simpson arose from the fact that in making preliminary arrangements in regard to a Liberal Candidate to represent the East Riding of the City of Toronto, in which we anticipated (and rightly anticipated, as the event proved) a very hot contest, it became necessary to give a promise that the sum of five hundred dollars would be contributed from the said General Election Fund to the actually necessary and lawful expenses of the Liberal Candidate in that Riding : that this promise was given by me on behalf of myself and others ; that when the time came for its fulfilment, the General Election Fund had been exhausted, and a special effort had to be made to provide the said sum of five hundred dollars, or break faith. I say that the said amount not having been forthcoming, I paid it from my own funds in order to fulfil my promise, the balance between the said sum of \$122 or \$123 received as aforesaid being a personal contribution by me to said Fund. And I further say that the said sum of \$500 was the only apportionment of so large an amount made to any Constituency from the said General Election Fund ; that the next highest sum given was either \$250 or \$300 ; and that the balance of the \$3,700 composing the fund was apportioned in sums varying from \$20 to \$200.

33. I say that the "grand stand to be made on Saturday," at the East Toronto Election, spoken of in my said letter to Mr. Simpson, referred to the thorough organization of the Ward Committees, and the systematic



arrangements for bringing up promptly and fully the voters for the Liberal Candidate, and the vigilant exertions at the polls to detect and prevent the admission of fraudulent votes. The "Big Push" spoken of in the said letter had the same meaning.

In answer the defendant filed the following affidavit:—

1. That I am the above named defendant.

2. That I have this morning read what purports to be a copy of an affidavit of the Hon. George Brown, intended to be filed on a motion to commit him for a contempt of this honourable Court.

3. That in reference to clause thirteen of said affidavit, which speaks of an article in my newspaper of the seventh day of the month of July last, (which was copied from the *Mail* newspaper) I say (as to the excuse there attempted to be made that such article in my newspaper was one of the reasons why the articles in the *Globe* of the eighth and fourteenth days of July last, were written), that my newspaper, the *West Durham News*, is published on the Friday of each week, in the town of Bowmanville: that generally it is mailed in time for the night trains, going west towards Toronto, and sometimes not until time for the morning train of the Saturday following, so that in neither case could the said issue of my said newspaper have been received by the said George Brown, or at his office, until the morning of the eighth day of July last, after the publication of the *Globe* newspaper of that day.

4. In reference to clauses sixteen and seventeen of Mr. Brown's affidavit, which speak of the conversation which took place at Dr. Hopkins's house, I say that Mr. Brown was not present and cannot therefore truly swear, as he does, "that this story as to the election of 1867, is a pure fabrication." I am unable as yet to understand, from want of time to make enquires, how Mr. Brown is enabled to swear to clause seventeen of his said affidavit, but I assert most positively that what was stated by me as to what took place at said time in Dr. Hopkins's house, is substantially true, and that my information as to the name Miller, and as to his connection with Mr. Brown, was obtained by me by said Miller being introduced to me as Mr. Miller, and by the conversation which then took place, and from what was stated to me subsequently by Dr. Hopkins, Jr., I say moreover, that it was the common report, and it is generally believed in the said riding of South Ontario, that enormous sums of money were spent by Mr. Brown at the said election contest in 1867, and the amount was currently stated at about twenty-five thousand dollars.

6. That the said article in my newspaper of the twenty-fourth day of November last, entitled "Standard Elevators," was not written in reference to the present proposed application, and no thought of such application entered my mind at the time. The said article was a fair and general discussion as to what a large part of the community believe to be the hypocrisy displayed by the political party of which Mr. Brown is said to be the leader, in assuming to be the party and elevating the standard of political purity, and what is said as to Mr. Brown's election contest was simply given by me as one of many instances by which it was sought to substantiate the said charge of hypocrisy, and was not intended to, and I believe could not in any way influence in the slightest the result of this application.

7. With reference to the articles in the *West Durham News* of the fourteenth, twenty-first and twenty-eighth days of July last, cited in clause twenty-one of Mr. Brown's said affidavit, I say that the statements then made were made in perfect good faith, and I then thought that the said articles in the *Globe* of the eighth and fourteenth days of July last, would not prejudice my case, believing, as I still believe, that they were of such a nature as to carry their own condemnation to the

thinking and unprejudiced portion of the community. But subsequently I was led to believe, and when I made my affidavit herein, on the twenty-eighth day of September last I did and do now verily believe, from a variety of circumstances, conversations and articles in certain newspapers, that the fair trial of my case has been prejudiced by the said articles in said *Globe* newspaper, and I am now further convinced of this from what has since appeared in the *Paisley Advocate* newspaper, which was recently brought to the attention of this Court.

8. In reference to clause thirty-seven of Mr. Brown's affidavit, I am advised and verily believe that in the year 1872, it was not a legal expense to expend money in bringing up voters to the poll.

9. That as to the payment of the necessary and legal expenses of an election, and as to the demand made by Mr. Brown on Mr. Simpson for money to be used on the said polling day, it is the almost universal practice to pay the great bulk of them after the accounts therefor have been audited by the candidate, or by his election agent, or by a committee, subsequently to the polling day.

*James Carmichael* made an affidavit substantially to the same effect as the eleventh paragraph of the defendant's affidavit.

The article, which was the ground of this application, as it appeared in the *Weekly Globe* of the 14th July, and in the *Daily Globe* of the 8th July, was as follows. The italics and capitals are as in the original:—

#### JUSTICE WILSON ON THE WAR-PATH.—THE BOWMANVILLE LIBEL SUIT.—THE "BIG PUSH" LETTER.

The manner in which the Judicial System of the Province of Ontario is, as a whole, administered is worthy of the highest admiration. Justice is ably and uprightly dispensed among us. The Judges but rarely deviate from that wise reserve of speech and temper which gives dignity to their office, and creates public confidence in their decisions. All classes of the community, consequently, have implicit faith in the Judiciary: and rare indeed is the occasion when the public journalist feels constrained to criticise with severity the utterances of an occupant of the Bench. Indeed, so sensitive for the good name and fame of the Law Courts of the Province has the press as a rule been, that it may be doubted whether on some occasions things have not been allowed to pass in silence that in the interest of the people might profitably have been treated with sharp criticism. It is not well that any body of men clothed with the vast power over the lives and characters and fortunes of their fellow-subjects which our Judges wield, should fall into forgetfulness of their mortality, or should fail to keep in mind that the higher their trust the more guarded should they be in discharging its duties; and the greater the influence of their decisions and utterances, the more just in judgment and the more careful in speech they ought to be.

An incident occurred in the Court of Queen's Bench last week that cannot be passed over in silence. Chief Justice Harrison, Mr. Justice Morrison, and Mr. Justice Adam Wilson—the three Judges constituting the Court—were on the Bench giving judgment on matters that had been argued before them by counsel at previous sittings and reserved for decision. In its turn, the case of *Simpson versus Wilkinson*, came up for judgment. This case was an application by the Hon. John Simpson, of Bowmanville, Senator of the Dominion and President of the Ontario Bank, for the issuing

by the Court of a criminal information against the publisher of *The West Durham News*, for the publication in separate numbers of his paper of three alleged malicious libels against Mr. Simpson. The first of these libels was published on the 5th November, 1875, and was entitled "The Ontario Bank and its President." It charged that substantial aid for corrupt purposes was secured in past elections in the county of Durham through Mr. Simpson; that he extended credit at a suspicious time to institutions that control votes; that partiality was shown to the Ontario Bank by Government in the matter of deposits; and that these and other things completed the presumptive evidence of his intrigue in political matters.

The second libel published on the 12th November, 1875, was entitled "Senator Simpson's Denial," and it charged that Mr. Simpson, at a moment of political crisis, had bought the votes of three members of the House of Commons for \$30,000.

The third libel was published on the 19th November, 1875, and alleged corrupt practices at elections. The pith of it was as follows:—"Who sent the \$2,000 to Clarke at the time of the Blake-Milne election? And who is it that still holds a claim of \$800 for money spent at that time?"

The application of Mr. Simpson was, that the Court should order Mr. Wilkinson to be held to trial criminally at the Assizes for these three libels—and he accompanied his application with affidavits distinctly denying the truth of the allegations to his detriment made in the libels. The application was merely a preliminary step in the cause, not affecting its ultimate decision on the merits, but simply as to the mode of trial.

Chief Justice Harrison pronounced the judgment of the Court on this application, which was the unanimous finding of the three Judges. The decision was that a criminal information should be filed against Mr. Wilkinson for the publication of 12th and 19th November, and that as to the publication of the 5th November a sufficient case had not been made out to warrant that step.

Now with this decision of the Court we find no fault. Doubtless it was arrived at after a careful examination of the evidence submitted, and is in accordance with legal usage. It is with what followed the pronouncing of this decision by the Chief Justice that we have to do at present.

No sooner had the Chief Justice finished than Mr. Justice Wilson availed himself of the occasion to express his views on the matter with a freedom of speech and an indifference as to the evidence before the Court, and an indulgence in assumptions, surmises, and insinuations, that we believe to be totally unparalleled in the judicial proceedings of any Canadian Court. Entering minutely into every detail of the libels complained of, he was not content to follow the example of his Chief, and deal with the legal aspects of the application as a mere preliminary step towards the formal jury trial that was to follow; but he favoured the world with his views on every subject directly or indirectly connected, or not connected at all, with the matter before the Court. He assumed to be true, without a particle of evidence to prove them so, scraps of articles culled by the defendant from newspapers, and paraded as justification of his scandalous libels—and though compelled to join with his associate Judges in granting to Mr. Simpson the Criminal Information demanded against his libeller, he ventured to employ language towards that gentleman that could not have been justifiable had every slander and innuendo of the defendant been established beyond doubt.

It may be perfectly sound law to decide that because Mr. Simpson's counsel selected only three out of a score of libels discharged at him by the defendant, and did not proceed against him for all of them, or because his counsel refused to notice slanders dragged in neck and heels into the pretended justification of the defendant that had no connection whatever with the three libels complained of, therefore Mr. Simpson was cut off from proceeding by Criminal Information, and must seek his redress against his



libeller by the ordinary course of Indictment. But there could be neither law nor justice nor common decency in Mr. Justice Wilson's assuming that because Mr. Simpson's counsel (with at least equal legal knowledge and equal legal experience with himself) advisedly took that course—*therefore* Mr. Simpson was unable to deny them, *therefore* they were all true, *therefore* Mr. Simpson was a convicted "intriguer," an unfaithful Bank President, a wholesale corrupter of the electors, and Mr. Justice Wilson was entitled to discharge abuse at him by the hour.

"Mr. Simpson," quoth Mr. Justice Wilson, "has not denied what is called 'his famous circular,' nor his 'extending credit at a suspicious time to institutions that control votes,' nor 'his letter to the Finance Minister, nor his using the influence that the money of others entrusted to him gave him for corrupt purposes.'" *And yet what is the fact?* Why, that Mr. Simpson, in his affidavit accompanying his original application, *gave a flat and explicit contradiction to these very things.* He first quoted in his affidavit the words of his assailant in these matters, and then he swore as follows:—

"I say, that the statements, charges, and imputations therein contained against me are false, malicious, and without foundation in fact. \* \* \* I further say, that the imputations against me of political intriguing, and of securing substantial aid for corrupt purposes, and that I have paid out money for the purposes of bribery at elections, and that I used the money of others corruptly, are untrue, false, and malicious. \* \* \*. I say I have never used the money of others corruptly or against their interests. \* \* \* I further say, that from the starting of the Ontario Bank to the present time not one cent of the moneys of the said Bank has been expended or used for political purposes, and that the allegations of corrupt transactions having taken place between the Government and the Ontario Bank are utterly untrue, and without any foundation whatever."

In the face of this affidavit, Mr. Wilson ventures to "assume" there has been no denial!

"I presume," says Mr. Justice Wilson, "the circular to the electors is not intended to be denied. It has been used by the defendant as part of the case he has made in resisting this motion. \* \* \* I am of opinion that it should have been presented to the Court by the complainant as a part of his case." And because Mr. Simpson's counsel were of a different opinion, and did not present the circular as part of his case, the Court dismissed the application for a criminal information as to this libel, and left Mr. Simpson to his redress by ordinary indictment. Had Mr. Justice Wilson been content with leaving the matter there, as the Chief Justice had done, he would have kept within his province. But Mr. Wilson took a very different course.

"I presume," said Mr. Justice Wilson, "the letter to the Finance Minister is not intended to be denied. It has been used by the defendant as part of the case he has made in resisting this motion." \* \* \* I am of opinion that it should have been presented to the Court by the complainant as a part of his case. \* \* \* The letter to the Finance Minister is not given, *but the complainant says*, in a letter printed in THE GLOBE newspaper, on 7th September, 1875, he (Mr. Simpson) did write a letter complaining bitterly of the manner in which the Government surplus had been disposed of by the late Government, greatly to the prejudice of Ontario, for many years, and he did ask him to right the wrong." And so, because Mr. Simpson's counsel did not advise him to produce this probably private and confidential letter, that had no connection with the libels of the defendant, that was not before the Court, and the contents of which are to this moment unknown, and may have been entirely unobjectionable—Mr. Wilson feels himself at liberty to deduce



the most severe assumptions as to its possible contents, and to assail Mr. Simpson in the most insolent strain.

But all this is nothing to what followed. "These documents," proceeded Mr. Wilson, "and a third one fyled by the defendant, being a letter *from the Hon. George Brown*, dated the 15th of August, 1872, to the complainant, it will be material to consider. \* \* \* *It is true the complainant was only the receiver of that letter*; but he has not, IT IS SAID, repudiated it, but replied to it. What that reply was, does not appear. The complainant has given no explanation of himself with respect to it, as he was bound to do. In the absence of any statement about it, it must be assumed, on such an application as this, that he cannot make any satisfactory explanation to the Court concerning it." And thereupon Mr. Justice Wilson proceeds to hold Mr. Simpson responsible for every word of that letter, to distort its meaning, and to impute the most corrupt motives and conduct to Mr. Simpson in connection with it.

We have all heard of hanging a man first and trying him afterwards; but Mr. Justice Wilson takes his seat on the Bench to try a man accused of publishing three scandalous libels—and ends with hanging two men not accused of anything. One he hangs because incidentally *he is said to have written a letter*, not before the Court, not connected with any matter before it, and not even proved to have an existence. The other he hangs because *he is said to be the party to whom the letter was written*, but which letter he declares never reached him, and which, consequently, he never responded to, and had no act, part, or knowledge in connection with!

True, Mr. Wilson tells us that the defendant—that is, Mr. Wilkinson—*says he has no knowledge that Mr. Simpson has ever "denied having received said letter,"* and that he is *credibly informed and believes that "he did, in fact, receive the same,"* and replied to it. But both Mr. Wilson and Mr. Wilkinson knew that this was not true. Mr. Wilson gravely propounded the doctrine, to justify his dragging into the case scraps of newspaper articles and fatherless slander against Mr. Simpson, that a Judge solemnly pronouncing judgment from the Bench "*may take notice of those matters which every person of ordinary intelligence is acquainted with.*" We cannot be so rude as to assume that Mr. Justice Wilson is not a "person of ordinary intelligence," and we know that Mr. Wilkinson is unquestionably such a person; moreover, it is well known that all persons of that class in Canada regularly read THE GLOBE; and that even did Messrs. Wilson and Wilkinson claim to be exempted from that category, no hole of escape for them was open for such a fabrication. They had in their hands the statement of Mr. George Brown, published over the signature of that gentleman in the GLOBE of the 27th September, 1875—Mr. Wilkinson inserted an extract from it in his affidavit—Judge Wilson had it before him while he spoke—and in that statement there is the following passage: *"Mr. Simpson informs me that he has no such letter; that he has no recollection of having received or having seen any such letter; and that he is quite certain he contributed no money to the fund referred to."* What is sauce for the goose is sauce for the gander. We don't pretend to say that the unsworn statement of Mr. Brown, or Mr. anybody else, in a newspaper should be accepted as evidence—it is Mr. Justice Wilson who says that. But we do say, that if Mr. Wilkinson's "never to my knowledge," "I am credibly informed," "I verily believe," "I am informed and verily believe," "I further became convinced," without even the pretence to any personal knowledge of his own as to the statements made, and without the name being given of a single person who had—are to be held as proving the wickedness of Mr. Simpson beyond a cavil, then surely it would have been only reasonable, only

honest, only the duty of Mr. Justice Wilson to state, as a set-off to Mr. Wilkinson's "never to my knowledge denied," the simple fact published in the article from *The Globe*, from which he had only a minute before read an extract, and which he had at that very moment in his hands, that Mr. Simpson did deny having any such letter in his possession, or having ever received or seen such a letter.

One of the noblest principles of British law is properly supposed to be that every man is held to be innocent until he is proved guilty. Mr. Justice Wilson repudiates this entirely, and promulgates a new code of his own. And thus it runs :—

CAP. I.—If a man sues another for libel, any letter sent to the plaintiff from another, asking for a subscription to a political fund, "must be considered," and the plaintiff will be held responsible for the contents as *particeps criminis* in a "political intrigue."

CAP. II.—If the letter is a private and confidential communication, and stolen in transmission, and its contents have no connection whatever with the subject before the Court—that don't signify. "It has acquired a public notoriety, and the Court may properly take notice of those matters which every person of ordinary intelligence is acquainted with."

CAP. III.—If there be no proof whatever before the Court that the said letter was ever written, or was ever sent, or was ever received by anybody—that makes no sort of difference. It is enough for all judicial purposes of the Queen's Bench that the thing has appeared in a newspaper, and that the party charged with libel presents a copy of it to the Court, cut from the *Mail* newspaper with a sharp-pointed penknife.

CAP. IV.—When the Judge pronounces his judgment on the plaintiff's application it will be competent for his Lordship to read and comment with very great emphasis on that part of the defendant's affidavit in which he says :—"The said Hon. John Simpson has never to my knowledge denied having received said letter, and I am credibly informed, and do verily believe, that he did in fact receive the same, and that he replied, or caused a reply to be written thereto." But, on the other hand, in reading any article from *The Globe* in which reference is made to the said letter, it will be just and decorous to read only those passages that suit the purposes of the defendant, and to omit and utterly ignore the existence of such passages as this : "*Mr. Simpson informs me that he has no such letter ; that he has no recollection of having received or having seen such a letter ; and that he is quite certain he contributed no money to the fund referred to.*"

CAP. V.—And always, thereafter, the said public denial of the plaintiff that he ever received such a letter, or ever saw it, or replied to it, shall be utterly ignored and repudiated ; but the statement of the defendant, that the plaintiff "never to his (the defendant's) knowledge denied having received the said letter," shall be accepted as proof conclusive that he did receive it, and did reply to it.

CAP. VI.—And thereafter it shall be right and proper and candid for Judge Wilson to use and repeat in his judgment in the cause such language as this :—"The letter which the complainant RECEIVED from Mr. Brown"—"the complainant was only the RECEIVER of the letter"—"the complainant has not, it is said, repudiated it, but replied to it"—"What that reply was does not appear"—"The complainant has given no explanation of himself with respect to it, as he was bound to do"—"In the absence of any statement about it, it must be assumed on such an application as this that he cannot make any satisfactory explanation to the Court concerning it."

But Judge Wilson did not content himself with indulging in legal eccentricities. He must needs read a moral, political, and constitutional lecture to Mr. Simpson and his brother Senators on the criminality of their interfering in the political arena. He tells them what the English law as to the Peers is on the subject; that if the English law applies here a Senator has no right to interfere in elections; that whether it applies or not here "need not be determined"; that whether there is a "strict obligation on a Senator not to concern himself in elections" he may be permitted to say "there is a moral obligation on him not to do so;" it "strikes" his Lordship that there is "an impropriety, to say the least," in a Senator doing it. And so on Mr. Justice Wilson goes for half a column, chattering about a matter he had nothing to do with, and which he evidently knows very little about. Suppose Mr. Simpson did take an active part in political affairs, as nine-tenths of the Peers of England and of the Legislative Councillors and Senators of Canada have done from time immemorial—is that any justification for a journalist's falsely denouncing him for his infidelity to his trust as a Bank President, and using the money of his bank for political purposes?

But if Mr. Justice Wilson was so unjust and reckless in his treatment of the plaintiff in the case before the Court, how infinitely worse was his conduct towards one who had no connection with the case, who could not reply in Court to his abuse, and whose letter was only dragged into this matter for petty political purposes. It has been ridiculous enough to hear Tory newspapers for nearly a year past making night and day hideous with their howlings about the "Big Push Letter;" but the Bench has descended low indeed when a Judge of the Queen's Bench condescends to take up the idiotic howl, and rivals the party-whoop of the most blatant pot-house politician.

Let us recall to the minds of our readers what the contents of the "Big Push Letter" were. Here is a copy of it:—

"[Private and Confidential.]

"Toronto, 15th August, 1872.

"MY DEAR SIR,—The fight goes bravely on, but it is hard to work up against the enormous sums the Government candidates have in their hands. We here have expended our strength in aiding the out-counties and helping our city candidates, but a big push has to be made on Saturday and Monday for the East and West Divisions, if we are not to succumb to the cash of the Government. We could carry all three Divisions easily but for the cash against us, and if we carry the first on Saturday the other two will go with us in spite of all the cash they can muster. We therefore make our grand stand on Saturday. There are but half a dozen people that can come down handsomely, and we have all done what we possibly can do, and we have to ask a very few outsiders to aid us. Will you be one? I have been urged to write to you, and comply accordingly.

"Faithfully yours,

"Hon. John Simpson,

GEO. BROWN."

"&c., &c.,

On Saturday, the 25th September, 1875, some garbled extracts from this letter appeared in the Tory papers, and on Monday morning the following statement appeared prominently in THE GLOBE over Mr. Brown's signature:—

"I deem it expedient that I should reply thus directly to the charges of political corruption brought against the Liberal party by the Conservative press on Saturday morning, based on the following extracts, said to have been taken from a letter written by me in 1872:—

\* \* \* \* \*



"Mr. Simpson informs me that he has no such letter; that he has no recollection of having received or having seen such a letter; and that he is quite certain he contributed no money to the fund referred to. I have no copy of the letter from which these extracts are stated to have been taken; but I have some recollection of writing some such letter, about the time mentioned, to three, or possibly four, political friends. I assume, therefore, that the words quoted above have been culled from a letter of mine. And, far from regretting that the Opposition organs have got possession of this letter, and have felt themselves at liberty to publish selected passages from it, I rejoice that they have done so, for it justifies me in stating thus publicly what was the amount and character of this fund, about which such wonderful stories have been invented as an answer to the sworn facts of the Pacific scandal.

"I have, then, to state that the party subscription in question was got up to aid in defraying the legal and necessary expenses of candidates unable to bear the whole cost of hotly-contested elections, or fighting for the Liberal cause in constituencies hopeless at the moment; and in defraying the travelling expenses of public speakers, circulating political documents, and other similar legal and proper expenses of a great electoral contest. I believe that the whole of the money subscribed was applied strictly to these purposes. I further state that the entire amount so raised and so expended was \$3,700—or the trumpery sum of \$45 to each of the 82 constituencies, had they all participated in it. And I state still further, that there was no general Reform fund but this for election purposes at the election of 1872 to my knowledge—and, had there been any other, I think I must have heard of it.

"GEO. BROWN."

The leader of the Liberal party, Mr. Mackenzie, had previously made a precisely similar statement as to the entire amount of the Liberal election fund of 1872, though that fact was unknown to Mr. Brown when the above was written.

And now let us see what Mr. Justice Wilson has the audacity to say of this letter, written as it was to a political friend, asking a subscription to a fund for so legitimate a purpose and of such moderate extent:—

"It is of course a plain demand for money to oppose, it is said, the expenditure by the Government candidates at the Toronto elections, and it is an admission that the writer and those co-operating with him had expended their strength, which I suppose means their money, in other constituencies for the like purpose. It is a letter written for corrupt purposes, to interfere with the freedom of elections. It is an invitation to the recipient, as one with some others and the writer, to concur in committing the offence of bribery and corruption at the polls."

According to Mr. Justice Wilson's new doctrine, that the Court "may properly take notice of those matters which every person of ordinary intelligence is acquainted with"—whatever the matter may be, and whether before the Court at the moment or not—we suppose we must accustom ourselves to such outrages as this from the Bench. But this Mr. Justice Wilson may rest assured of: that such slanders and insults shall not go unanswered, and if the dignity of the Bench is ruffled in the tussle, on his folly shall rest the blame. We cast back on Mr. Wilson his insolent and slanderous interpretation. The letter was *not* written for corrupt purposes—it was *not* written to interfere with the freedom of elections—it was *not* an invitation to anybody to concur in committing bribery and corruption at the polls,—and be he Judge or not who says so, the statement is false.



Does Mr. Wilson mean to say that no party fund for proper purposes in election contests can exist—that there are no expenditures of money in keenly contested elections which are absolutely necessary, perfectly moral and legitimate, and highly conducive to good government? Was there no such fund when Mr. Justice Wilson was in public life? When the hat went round in his contests for the Mayoralty of Toronto, was that, or was it not, a “concurrence in bribery and corruption at the polls?”

Does Mr. Wilson mean to say that there were not both Reform and Tory Funds for general party purposes at general elections while he was in Parliamentary life? None know better than the learned gentleman that there were both—that there never was an election without both—and that no party could be maintained without some such general electoral fund for purposes perfectly pure and patriotic.

Probably there never was another general election in Ontario, or Upper Canada, that on either side of politics cost so small a sum for general party purposes as the Reform expenditure of \$3,700 at the General Election of 1872; and assuredly there was at it neither the design that a penny of it should be spent for corrupt purposes, nor was there a shilling to spare from the necessary and legitimate expenditures for any such purpose. How could Mr. Justice Wilson, in his hunt for things that “every person of ordinary intelligence is acquainted with,” omit to state that while the entire General Election Fund of the Liberal party of that year—1872—was but \$3,700, raised by subscriptions from the private pockets of a few individuals, the Conservative Fund on the same occasion amounted to the enormous sum of \$200,000—raised by the flagitious sale of the Pacific Railway contract to a band of speculators on terms disastrous to the interests of the country.

The law has been greatly changed since the election of 1872. Every known mode of expending money under which even the suspicion of corrupting the electors could lurk has been most properly forbidden under severe penalties, and successfully enforced. But do election contests even now cost nothing? Are there no pure, legitimate, and legal modes of expenditure still remaining? Of course there are. In Ontario, official returns on oath are made of the total expenditure by each candidate in every contest for a seat in the Provincial Chamber. And what do these show? Why, that in the last electoral contest the declared cost of Mr. John Robinson's election for West Toronto was \$893 75; of Mr. Platt's contest in East Toronto, \$972 76; of Mr. M. C. Cameron's contest in East Toronto, \$944 59; and of that of Mr. Crooks in East Toronto, \$967 10; or, in all, for the expenses of these four gentlemen alone, \$3778 20—more than the entire amount of the “Big Push” fund of 1872 for the general conduct of the entire Dominion elections of Ontario.

It is in the face of these facts that Mr. Justice Wilson has the audacity, without any evidence that such a letter was ever written, or sent, or received, or acted upon—and without the slightest evidence as to the circumstances under which it might have been written, or the special purposes to which the money was to be applied—to denounce as a thing of monstrous depravity a request by one Reformer to another for a subscription to a General Election Fund of probably \$50, but at most \$100.

We deeply regret being compelled to write of the conduct of any member of the Ontario Bench in the tone of this article, but the offence was so rank, so reckless, so utterly unjustifiable, that soft words would have but poorly discharged our duty to the public.

December, 8, 9, 1876, *MacLennan*, Q. C., and *Edgar*, appeared as counsel for the Hon. Geo. Brown. Mr. *Brown*, however, shewed cause in person. He read the affidavit already set out, and filed by him, and commented upon the extracts therein given from the applicant's own paper, referring to the judgments in granting the criminal information, which extracts, he argued, misrepresented these judgments and their effect. He also referred to and commented upon the extracts from the applicant's paper, and from other papers containing attacks upon himself and Mr. Simpson, arguing that they were alone sufficient to disentitle the applicant to any interference of the Court on his behalf.

The affidavit of the applicant, he proceeded to argue, does not point out with any distinctness upon what allegation the action of the Court is claimed on his own account. "The matter of the said articles," it is said, "*touch upon* at least one of the said alleged libels with which I now stand charged." This is surely a charge too vague to require any answer, and yet it is as strong as the articles would warrant. If anything can be found there tending to prejudice the applicant, it relates rather to that one of the libels complained of by Mr. Simpson, on which the criminal information was refused, and can therefore form no ground for the present application. The applicant has himself in the strongest terms expressed his opinion that the articles will not prejudice his case—that they will in fact rather benefit him; and this alone is sufficient answer to his assertion now made to the contrary. Again, there is no comment upon a suit pending. The criminal information had not been filed then, and until that was done there was no suit in existence. The mere leave to file it is insufficient, for it might never have been acted upon. It is notorious that a large number of such applications, when once granted, never go further, for very frequently the object is attained by enabling the person charged to place upon the files of the Court his denial under oath of the charges made against him. If no comments are to be made after the leave to file an information has been

granted, how long is such restriction to continue? Is it to be put off for months, or perhaps for years, and how is the limit to be determined, or how is a public writer to know it? In moving for this attachment, the learned counsel (McCarthy, Q.C.) was asked by the Court why it had not been moved for sooner, and the answer was, that until the information had been filed there was no cause in Court which would enable the applicant to appear and ask for the rule. The same reasoning must apply now, and this application must fail on the same ground. If the article was not an offence when published, it of course cannot become one *ex post facto* by the subsequent filing of the information.

But, secondly, even if the suit was pending, this application is too late. Contempt of Court is a thing to be punished in all cases promptly, if at all—on the spot if committed in the presence of the Court. It is an extreme power assumed by old usage, and not regulated by statute. It is exercised absolutely at the discretion of the Court, and not to be questioned by or appealed to a higher Court or any other tribunal. Clearly, therefore, promptitude in correction of the contempt complained of is of the vital essence of the power. The natural mode of obtaining redress for wrong is by the ordinary channels of justice; and unless the offence is such as to demand a prompt remedy, the best argument offered for allowing usage to sweep aside all law for the protection of the subject, and make the Court absolute and infallible under extreme conditions, is gone. If the Court has permitted an offence to its dignity to pass unnoticed for five months, what reason can exist for not letting it rest a little longer until punished by the ordinary process of justice? Mr. Wilkinson and his counsel seem to have been perfectly aware of this bar to success in their application, and have endeavoured to remove it by the complainant's affidavit, paragraphs 13 and 14, but that they wholly fail to do, and no ground is furnished for overlooking five months' delay: *Republic v. Oswald*. 1 Dallas 319.

But, in the third place, even if the suit had been pending on the 8th July, and application had been made at the first opportunity, the article in the *Globe* did not affect the question to be tried. On that point I refer to paragraphs 19, 20, 21, and 22 of my affidavit. In applying for leave to file the criminal information against Wilkinson, Mr. Simpson preferred three separate charges on which he founded his application. On two of these charges leave was granted to file a criminal information, but on the third leave was refused, and no prosecution is or ever has been pending in regard to it. Now, the *Globe* strictures of 8th July were exclusively directed to the charge that was dismissed, and not one word in them has reference to the two charges now *sub judice*. It is therefore impossible that the *Globe's* strictures could prejudice the only trial to be had.

Fourthly, Mr. Wilkinson has debarred himself from making this application by his own acts. He himself has commented upon the case in the strongest possible terms, as I have shewn in my affidavit, paragraphs 12 and 13. He made a gross personal attack on me in direct connection with the judgment—he gave a strong provocation for retort—and now, after having taken the law into his own hands, he comes to this Court begging it to protect him against the article in the *Globe* which he himself provoked, and has never since ceased to denounce. It is out of all reason that he, who was one of the first to comment unfairly, and to the prejudice of his opponent, on the judgment of the Court of 29th June, and who thereby provoked and rendered necessary a reply and defence on the whole subject through the public press, should be permitted to force on the Court a course which it has not seen proper to take for the maintenance of its own dignity. And further, these extracts from the complainant's newspaper shew clearly that the present application is made in the most frivolous spirit, and from no honest regard for the dignity of this Court. In *Daw v. Eley*, L. R. 7 Eq. 61, it is said by Lord Romilly, in giving judgment on a similar application: "Unquestionably,



if a person submits to have the matter discussed in the public papers, and enters the arena of public discussion, he cannot afterwards complain that this has been done; the Court will say to him, ‘as you have thought fit to discuss it there, you have accepted another tribunal.’” [HARRISON, C. J.—If it should appear on a criminal information that the applicant has been commenting on the case, the Court will not grant an information on his application. MORRISON, J.—I think if the Court had been aware of the publication of that article in the *West Durham News*, I might have hesitated to grant the rule.] It is submitted therefore that this application must fail, *First*, because no suit was pending when the article complained of was published. *Secondly*, because even if a suit had been pending, the applicant comes into Court too late. *Thirdly*, because even if there had been a suit, and he had made his complaint in proper time, the articles complained of make no reference to the subject matter of the criminal information *sub judice*, but merely to matters finally disposed of by the Court. *Fourthly*, because Mr. Wilkinson has published, and repeated the publication, that the said *Globe* articles did not prejudice his cause. *Fifthly*, because he himself in his paper commented on the judgment of the Court, and distorted its meaning. *Sixthly*, because after the delivery of the judgment, and before the articles of the *Globe* were written, he bitterly attacked me personally in his paper, and has ever since continued to slander and vilify me; and having taken this course, he is not entitled to seek redress at the hands of the Court, but must find it in the arena he has chosen. There is no example in the books of the punishment of such a contempt after five months had elapsed without any proceedings having been taken, nor of such an interference at the instance of a person not in a position—as it may now be assumed that Mr. Wilkinson is not—to complain of the offence as unjustly prejudicing his own position.

But it is said that, apart from the applicant and his interests, the articles are a contempt of Court, and that being

before the Court they must be considered and punished in that view. The rule of Court, I am advised, is that any discussion in the press on matters pending in the Court is prohibited absolutely. A Court may doubtless move without the intervention of any person; but such applications are always the direct and voluntary act of the Court itself for its own protection or the protection of others, or they are at the instance of persons who, as parties or otherwise, have a right under the circumstances to move the Court for their own protection. This rule, however, should be discharged, even if the Court should think it right to punish me. It may do so of its own motion or by another independent proceeding; but I am here to-day at the instance of Mr. Wilkinson, and if it is manifest, as I venture to submit it is, that he has no right here without having had a cause before the Court when the alleged offence was committed, and that he comes here under the pretence of seeking reparation for an injury which he himself has publicly denied and ridiculed, and not to protect the dignity of the Court, then I should not be further called to account on his charge. It is not a matter in which he has any concern or right; it is entirely in the discretion of the Court itself. Putting Mr. Wilkinson then out of the question, and regarding only the charge that I have offended against the dignity of the Court, the time has elapsed within which this Court can, by any usage or rule of Court, call me to account for an offence against its dignity. Five months have passed away since the publication of these articles, without one word of objection from the Court; the judgment of Mr. Justice Wilson and the *Globe's* criticism upon it have been the subject of violent discussion, *pro* or *con*, over the Dominion all that time; hardly can a newspaper be found that has not dealt with the whole subject, and it has been made almost a party question. The Court, in the exercise of its discretion, has looked on in silence and refrained from interfering, and to move now must be to throw its weight and authority on one side or other of the political agitation. But further, the matter complained of

was not an attack in any shape upon the Bench. The judgment of the Court, and the action of the Court, was, in the very article complained of, commended in the highest degree. I call attention to these words. The article says :

“With this decision of the Court we find no fault. Doubtless it was arrived at after a careful examination of the evidence submitted, and in accordance with legal usage. *It is with what followed the pronouncing of this decision by the Chief Justice that we have to do at present.* No sooner had the Chief Justice finished than Mr. Justice Wilson availed himself of the occasion to express his views on the matter with a freedom of speech and an indifference as to the evidence before the Court, and an indulgence in assumptions, surmises, and insinuations, that we believe to be totally unparalleled in the judicial proceedings of any Canadian Court.”

I wrote so then—I say so now. I have searched the law books in vain for a case parallel to this, and I defy the learned counsel on the other side to shew any language ever used in the last half of the nineteenth century by any British or British Colonial Judge that for indiscretion and injustice bears the slightest parallel to that of Mr. Justice Wilson, for commenting on which this complaint has been made. The language of the Chief Justice was confined scrupulously to what was needed for the occasion—it did not pronounce on any point that might come before a Court or jury for trial. Here are the words :

“So far as the alleged libel of 5th November, 1875, is concerned, he (Mr. Simpson) has, I think, failed to bring before the Court all the circumstances connected with the transactions of which he complains, and for that, if for no other reason, we must refuse, as to that libel, the leave asked to file a criminal information.”

This was the whole it was conceived necessary by the Court to say—that Mr. Simpson had not presented a sufficient cause to justify giving this extraordinary remedy, and he was left to the ordinary tribunals of justice. [HARRISON, C. J.—That is what I considered it necessary, as a member of the Court, to say. My brother Judges had as much

right as I had to give their opinions, and any judgment read by any of the Judges was just as much the judgment of the Court as mine.] The article in the *Globe* was a criticism—it may be a severe criticism—not of the Court of Queen's Bench, but of the words of one of its members. I say that the personal dignity of one Judge only is affected by the article, and that the Court and its judgment were not only not severely criticised, but sustained in the strongest manner.

But, further, the article was written in discharge of my duty as a journalist, and as such was privileged. On this point, I cite some authorities, and first, in *Morgan's* "Law of Literature," vol. ii. page 423, it is laid down that

"The due administration of justice is a matter of the very highest possible concern to the public, and in its interest, as we have seen in the chapter on Contempt of Court, the widest latitude will be accorded to the press and public in commenting thereupon. It is only when such comments actually impair or impede such due administration of justice by the Courts that they will be summarily dealt with."

I submit that I have not in the slightest degree offended in that respect, or written one word that tended to impair or impede the due administration of justice. In *Wason v. Walter*, L. R. 4 Q. B. 73, 93, 94, Cockburn, C. J., says:—

"Our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times been recognized. Comments on Government, on Ministers and Officers of State, on members of both Houses of Parliament, on Judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions, or *ex officio* informations, and would have brought down fine and imprisonment on publishers and authors."

I refer also to the language of the same learned Judge, in *Woodgate v. Elliot*, 4 F. & F. 223, and to *Toogood v. Spyring*, 1 Cr. M. & R. 193, per Parke, B.



In *Regina v. Sullivan*, 11 Cox. C. C. 57, Mr. Justice Fitzgerald directed the jury in dealing with a seditious libel as follows:—

“The defendant had a right to discuss fairly and *bonâ fide* the administration of justice as evidenced in this trial. It is open to him to shew that error was committed on the part of the Judge or jury; nay, further, for myself I will say that the Judges invite discussion of their acts in the administration of the law, and it is a relief to them to see error pointed out, if it is committed; yet while they invite the freest discussion, it is not open to a journalist to impute corruption.”

In these articles, there is not the slightest imputation of corruption or improper motive on the part of Mr. Justice Wilson. The criticism is entirely confined to marking the extreme recklessness and injustice of his charges and imputations against individuals. It is impossible to regard the article as otherwise than a free criticism by the public press written in the interest of the public, in the interest of suitors, and in the interest of the Court itself. There was no improper motive ascribed to the Judge, or imputation cast upon him, except that his words were cruel, and not in consistency with law or justice. Read the article from that point of view, and I submit that according to the doctrines as to the freedom of the public press as laid down by the eminent Judges whose words I have quoted, if what I have written was true, and if I honestly believed, as I did and as I do now believe, every word of it was true and just, whether I must not be absolved of every charge of malice. I did not push myself into this controversy. I was dragged into it.

In *Morgan's Law of Literature*, vol. i., page 409, it is said:

“The duty which the public expects from the press, of watching and making generally known the acts of all public servants, and censuring them when deserving of censure, of commenting freely on all matters which touch the public welfare, of fearlessly exposing whatever is corrupt, oppressive, or otherwise deserving of reprobation—of being, as it should be, and is when rightly conducted, a censor of

the public morals and a keeper of the public virtue, entitle it to a latitude and a leniency where its functions are exercised *bonâ fide* in that regard."

I submit, that the only light in which the article complained of can be justly be regarded, is as the criticism of a public journal that was absolutely necessary to be written in the public interest, and as such absolutely privileged, if honestly written, however severe the judgment, if improper motives are not imputed. It is not to the public interest that the press should be restrained from free criticism on all public matters. Am I to be told, in reference to a letter which was never in Court, which was not proved to be in existence, nor to have reached the party to whom it was addressed, that I wrote it for corrupt purposes, and that I had been guilty of a criminal act, though not a party nor a witness before the Court, and though the assumptions were entirely unfounded? But I submit further that the article complained of was written under compulsion: that it was absolutely necessary to meet the bitter attacks on the Government, on the Reform party, on public men on the Reform side, and on myself, made by the Conservative press, and these attacks based on the official judgment of a Judge of this Court. The learned counsel will no doubt lay great stress on the strength of the language used in the article, but is the ground to be taken that a Judge can do no wrong—that he may say what he likes of anybody, and if strong remonstrance is made, summary fine and imprisonment without question or appeal await the offender? That doctrine can hardly be entertained in the light of the present day. No Court in England or the United States would hold one guilty of contempt who had but replied to a groundless attack of a Judge gratuitously made on him in his absence, and when neither a party nor a witness in any cause before the Court. The utmost latitude in language would be held justifiable in defence from an attack such as that. Mr. Justice Wilson, moreover, in adopting the course he took, must have known that he was

dealing with a political question of the utmost notoriety, which was at that moment being discussed throughout the country, and that in the important elections coming off two days afterwards, his judgment would certainly be used, as it was, as a political engine by the party in opposition.

The defendant here commented at length on the judgment, contending that it was unjust as regarded Mr. Simpson, and would tend to prejudice him in the trial; and that the use which had been made of it for party and political purposes compelled him as a journalist to answer it. He contended, also, that as a personal attack upon himself, he being absent and no party to the cause, he was fully justified in denying the charge made and defending himself. He read over and commented at length upon the judgment so far as it related to the letter written by him, denied wholly the construction placed upon the letter, argued that he had already published in his journal the explanation of it, and of the facts which led to its being written, and that this must have been known to and should have been taken notice of by the learned Judge. He concluded by a summary of his whole argument, and contended strongly that the article, however strong might be its language, was justified by the personal provocation received, and by the circumstances under which it was written. He referred as to the law of contempt to *Morgan*, 232, 237, 249, 303, *Rex v. Almon*, 5 Burr. 2686.

*Robinson*, Q. C., *O'Brien* with him, supported the rule. The argument of Mr. Brown presents the question in two aspects, one as to the rights which Mr. Wilkinson, the applicant, may have in this matter, and the other as to the nature and general character of the article in question, and as to whether it is or is not a contempt of Court. But Mr. Wilkinson's rights and interests have become unimportant in view of the defence which has been openly urged here. The real and only question now is, whether the law is to prevail, or whether this defendant is to be allowed deliberately to place himself above the law and set it at defiance—a question which has hitherto never been allowed for

one instant to be debated in an English Court of justice. The irrelevancy and impropriety of much that is contained in Mr. Brown's affidavit, and of much more still that he has addressed to the Court in the way of argument, is plain, but we have not interrupted with objections, because the case has been argued by him in person, and not by counsel, who understand the rules and who are bound by the practice of the Courts. As to the preliminary objections. 1. It is not necessary that the suit should have been pending when the article was published: *Morgan* p. 259; *Shortt* p. 378, and the case referred to in both these publications, *Ex parte Turner*, 3 M. D. & D. 544, 5. There the attachment was granted even although the suit had actually been concluded. Here it can be said only that for a moment the suit was in suspense. It has been argued that if a journalist is not to be permitted to discuss the merits of the case between the granting of the information and the serving of the subpoena it is impossible to say how long he is to be prohibited from doing so, or where the line is to be drawn; but the answer is, that it is for the Court to determine when the limit has been exceeded: *Rex v. Clement*, 4 B. & Al. 218, 230, 231. It cannot be maintained that after the criminal information has been granted, and although no undue delay has taken place in the prosecution of it, a public journalist is at liberty to prejudice the public mind in a suit which everybody has good reason to believe is going on and is to be tried. In this case there was no delay that could be complained of. The rule for the criminal information was granted on the 29th June, and this publication was on the 8th July. No assizes had passed, and there had been no delay on the part of the prosecution in bringing the information to trial.

2. The next objection is, that this application is made too late. As to the case cited of *The Republic v. Oswald*, 1 Dallas 319, it is sufficient to say that the delay which the Court refused there to sanction was in shewing cause to the rule for commitment, not in applying for it.



When this article first appeared the defendant believed, as did many others, that an article conceived in its tone and written in its spirit would probably furnish its own answer. He had reason, however, afterwards to think differently; and on the 28th of September, therefore, he made his affidavit, which is now filed as ground for this application. The intention then was to move, if possible, before a single Judge; but upon consideration it was thought that this could not properly be done. For almost all purposes a single Judge under our new system is regarded as the whole Court, but it would seem that sitting out of term he has not power to commit for a previous contempt of the Court: *Shortt* 362; *Folkard* on Libel, 4th ed., p. 631; *Van Sandau v. Turner*, 6 Q. B. 777, 783; *Ranston's Case*, L. R. 3 P. C. 427. It thus became necessary to wait until term; and a further question then arose, whether it was proper for Mr. Wilkinson to make this application on his own behalf before the prosecutor had shewn his intention to go on with the criminal information. It has been said correctly, that in some instances the object of a criminal information is gained when the judgment of the Court has been given upon the preliminary application; and it might be said, that whether this article could affect his trial must depend upon whether the prosecutor intended to further proceed with the criminal information; and that, as his only interest in the matter was the effect of the article upon him, he should wait till he knew what was the intention. The subpoena was not served upon him till the 9th, which was the last day of Trinity term. Before the succeeding term, which was the first opportunity upon which he could move, he had the best possible reason to know that the effect of that publication had been to injure him greatly, and that if he desired a fair trial he must take notice of it and bring it before the Court. He had reason to know this from the publication which appeared in the *Paisley Advocate*, in regard to which the papers are now in Court. It is perfectly true—and Mr. Wilkinson does not attempt to deny it—that

he thought the article would do him no harm. It is equally true that he knew afterwards that it did do him serious harm; and he was then bound to take the only means of redress open to him. This answers incidentally also that part of Mr. Brown's argument in which he says that, admitting that the suit was really pending and that there was no delay, the article did not in any way affect the case. It produced the article in the *Paisley Advocate*, in which the applicant was spoken of as already a convicted libeller.

3. Mr. Brown then objects that Mr. Wilkinson has brought this matter into the arena of public discussion. We concede greater liberty of comment upon judgments than the defendant himself claimed in the *beginning* of his argument, when he said that he believed it to be the rule that when a suit is pending *no comment* upon it is to be permitted. That is the general rule; but we believe there are exceptions to it, and that this case furnishes an exception. One has to remember that this letter, originally written in 1872, was published in September, 1875, before any suit or information was thought of. It had been the subject of discussion by the public press of the country before; and if when that letter became connected with this suit—and when this judgment was given and published—Mr. Brown had written a temperate letter to the public papers, saying that whatever the judgment might contain, or whatever the words of his letter might be, the construction which had been put upon them, so far as regarded his intention and his meaning, was wrong; and if he had asked the public to suspend their judgment until he had an opportunity of shewing what was his real meaning, we do not think that could have been said to be a contempt of Court. We concede to Mr. Brown a peculiar position. As a Senator of the Dominion, and as the editor of an influential party paper, we admit his right to think that his character might be a matter of concern to others than himself; and we do not see, therefore, that such comment as we have suggested could have been objectionable. But

when instead of that—instead of writing over his own signature, with the weight and only the weight that would attach to an individual name—he devoted a leading article of a powerful journal, not to a fair statement of what that letter meant or did not mean, but to an assertion that everybody who put a different meaning on that letter was, in point of fact, a liar; when he descended to the use of such language, he did prejudice our defence, and went far beyond the fair line of comment, and was guilty of a gross contempt of Court, of which Mr. Wilkinson had a right to take notice. The effect of the utterances of a paper having the influence which many think this paper has among a very large class of people must not be overlooked; and when, a construction having been put upon that letter which Mr. Wilkinson said was the true one, which a learned Judge has said was a true one, and which it was essential for Mr. Wilkinson at his trial to maintain as the true one—the defendant writes such an article and says: “The letter was *not* written for corrupt purposes—it was *not* written to interfere with the freedom of elections—it was *not* an invitation to anybody to concur in committing bribery and corruption at the polls—and be he Judge or not who says so, the statement is false”—then we say, a threat was thrown out which might prejudice jurors in arriving at a fair conclusion, which might prejudice witnesses; and which might prejudice the Judge—if that were possible—in giving his decision. Judges have said that menaces of this sort are not to be allowed, however contemptible they may appear, and however little Judges may care for the opinion expressed of them. The question is not whether it did prejudice Mr. Wilkinson; but whether it was calculated to prejudice him. [MORRISON, J.—In regard to this question of prejudice, what effect had Mr. Wilkinson’s letters or articles in prejudicing the case of the Crown?] Mr. Wilkinson’s articles in effect only reiterate his belief in the truthfulness of the judgment, and it was impossible to prevent that in this case. It is when the person descends to menace the Court—not merely to say that

the Court has arrived at an inaccurate conclusion, but to say that the Court, and any one else who differs with the writer, is guilty of falsehood—that he is guilty of contempt. Mr. Brown, if he had said simply that the judgment was incorrect as regarded the construction placed upon the letter, would not have stood accused as he now does; but when he says that the judgment is “insolent,” “slanderous,” and “false,” he says something very different, and which is calculated to have a very different effect. Mr. Wilkinson has held out no threat, and has said nothing violent or intemperate in any respect so far as regards the meaning of the letter.

A very large portion of Mr. Brown's affidavit partakes more of the nature of a political manifesto than of an affidavit appropriate to this application. Much of it relates to a well known public matter which happened in this country in the year 1872, and which has no conceivable bearing on the question before us.

Mr. Brown has then argued that the article is a fair and justifiable comment, imputing no corrupt or improper motive. In one part of the article it is said, “True, Mr. Wilson tells us that the defendant—that is, Mr. Wilkinson—says he has no knowledge that Mr. Simpson has ever denied having received said letter, and that he is credibly informed and believes that he did in fact receive the same and replied to it. But both Mr. Wilson and Mr. Wilkinson knew that this was not true.” There is here a charge against Mr. Justice Wilson in his judicial utterances of deliberately and wilfully using words that are not true, and against Mr. Wilkinson of deliberately swearing to what he knew was not true. Again it is said, “Surely it would have been only reasonable and honest, only the duty of Mr. Justice Wilson, to state the simple fact published in the article from the *Globe* from which he had only a minute before read an extract, and which he had at that very moment in his hands, that Mr. Simpson did deny having any such letter in his possession, or having ever received or seen such a letter.” Now



the fact is that Mr. Justice Wilson had not this article from the *Globe* before him at all. [HARRISON, C. J.—During the course of the argument I have been trying to think whether that was before us.] It was not. [HARRISON, C. J.—The assumption on the part of Mr. Brown appears to have been that, as it appears in the *Globe* newspaper, it was filed. Mr. Brown—I thought the paper was there. It ought to have been there, and it was a concealment from the Court if it was not there.] There was no concealment; the papers were filed in the public Court, and were there for all persons to examine. What was put in was an extract from the article of Mr. Brown, in which there was no assertion that Mr. Simpson did deny receiving that letter. [Mr. Brown—But surely you would not think of putting in that and leaving out the other?] We are not discussing what might have been put in, but what was put in. We call attention to this very pointedly, because it is a proof of the utter recklessness with regard to the material and data upon which the article was written. If there was inadvertence or forgetfulness in ascertaining what was before the Court, we have only to say that inadvertence and forgetfulness are criminal in such a case, and that it is just as bad to make such a statement without ascertaining its truth as to state what is known to be untrue. There is no excuse for inaccuracy in facts, when those facts are used as the foundation of a charge against a learned Judge of having uttered a wilful falsehood in the discharge of his judicial duty, and when such charges are made by a person in Mr. Brown's position, he should know at least that the facts are true upon which he makes them.

It is said further that it was no part of the learned Judge's duty to attach any meaning to or to place any construction upon the letter which was before him, and that in doing so he went out of his way; but this is an entire misconception. One charge made against Mr. Simpson, for which he claimed a criminal information, was, that he was guilty of political intriguing. The defendant, the present applicant, said there was abundant ground for

making that charge, and to shew this he placed before the Court and asked them to consider two distinct items of evidence,—a circular written by Mr. Simpson in 1874, and this letter, which was written to Mr. Simpson by Mr. Brown, and which the applicant said contained a plain request to Mr. Simpson to furnish money to be used at the time for improper and illegal purposes. We said we believed that letter was written by Mr. Brown, and was received by Mr. Simpson; and that if so, and still more if Mr. Simpson replied to it, and still more if he acceded to its request and gave money on the strength of it—that furnished very strong evidence of Mr. Simpson being engaged in political intrigue. That was an important part of the case which we presented to the Court, and upon which it was the duty of the Court to form an opinion. It was of course quite competent to the learned Chief Justice to found his judgment wholly upon another ground—that Mr. Simpson had withheld from the Court facts which it was his duty to disclose in the first instance; but it was equally competent for Mr. Justice Wilson to found his opinion in part on this letter and the circular. He did found his opinion not only upon the circular but upon the letter, and he did what Courts are bound to do—he placed what he believed to be the legal and proper construction upon this written document. It is out of the question then to say that it was no part of Mr. Justice Wilson's duty to express his opinion upon that piece of evidence, placed before the Court, as it was, by Mr. Wilkinson, as justifying the charge complained of; and the learned Judge's opinion is expressed in language with which no one can find fault. He simply states what he believes to be the true meaning of that letter. The words are in fact too plain to admit of any doubt as to their meaning and proper construction. It is immaterial to this enquiry to be told that Mr. Brown got no response to that letter. The question is not what he got, but what he asked for, not what was intended by the writer, but what construction the words fairly bear.

Mr. Brown has also argued that the construction put

upon the letter is injurious to his character, and to the party with which he is connected, and conveys charges against him which any person is entitled to repudiate publicly or in private, whether they are made by a Judge in a Court of justice or by an individual. If so, there is an end to the administration of justice, for hardly an Assize passes in which the judgment of the Court, or of some learned Judge, does not assert, in effect, that some one is guilty of untruth or of perjury. It is well known there have been judgments on both sides during recent election trials in which candidates have been disqualified, and one case at least in which the candidate has been disbelieved on oath. This must be injurious to the candidate, and may be injurious to the party. But is any one at liberty in consequence to insult a Court of justice? If Courts are never temperately or otherwise to use language which may affect the reputation of private individuals, it would be impossible for them to exist or discharge their duty. It frequently becomes the duty of a Court to pronounce censure upon absent parties, and upon those who are not parties to the cause. In one election case it will be found that the conduct of a Senator was reflected upon by the then learned Chief Justice of this Court. He was not even a witness at the trial, and the judgment was given as the result of evidence which he never heard and had no opportunity of explaining.

It has also been urged that this article is a privileged communication. But there can be no privilege to commit a contempt of Court. Granted the contempt, the privilege of course ceases. There is a privilege to make fair, temperate, and proper comments upon the conduct of the Court, upon the judgment of the Court, and upon the conduct of the Judge, but these are not a contempt of Court. [HARRISON, C. J.—On the final judgment of the Court.] Yes. Mr. Brown has commented on this judgment of Mr. Justice Wilson as if it were a judgment delivered after the judgment of the Court, and has been properly reminded that the judgment of any member of the Court is just as

much the judgment of the Court as is the judgment of any other members. The judgment of each member is as much a judicial utterance as if it came from the whole Court.

With regard to Mr. Wilkinson's position and his right to complain, in *Vernor v. Vernor*, 23 L. T. N. S. 797, the question arose whether the complainant in that case had, by his own action, debarred himself from complaint. The distinction between the case cited by Mr. Brown, *Daw v. Eley*, L. R. 7 Eq. 49, and the present is, that there was there no question of contempt of Court. The words used, and the letters written, were open to no objection, except that they discussed the merits of the question then pending in Court. We refer also to *Coleman v. The West Hartlepool R. W. Co.*, 2 L. T. N. S. 766; *Shortt* 362, 375; *Folkard* on Libel and Slander, 4th ed., chaps. 36, 37, p. 637, 638. In *Felkin v. Lord Herbert*, 33 L. J. Ch. 294, the matter is put on the true basis. There the insult had been both to the Court and to the person complaining. The defendant apologised to the Court, but the complainant urged that he should apologise also to him. The answer of the Court was, that the complainant had mistaken his rights—that the action was not for contempt to him, but to the Court and to the administration of justice.

Mr. Brown has also urged that his intent in publishing this article was not to cast contempt upon the Court, nor in any way to injure the administration of justice. In *The People v. Wilson*, 16 Am. 528, the strongest expressions are used in regard to the insufficiency of that as an answer, even when combined with an apology, where the fair meaning of the words is calculated to have that effect. We prefer rather to some extent referring to American cases, because it may be thought that the limits of such discussion are wider and freer there than in England or in this country, which from the authorities we take to be a mistake. In *Shortt* 364, the same expressions will be found strongly used by an English Judge; and also in *Reg. v. Castro*, L. R. 9 Q. B. 226.



It was said also that this process is now asked for the first time in this country ; but that is an error. *Ex parte Lees*, 23 C. P. 214, shews that it has been used even by a County Court, and afterwards approved of by a Superior Court, and there has been at least one other case, not reported. Mr. Brown has ventured to put prominently forward the eulogistic remarks on the general administration of justice in the beginning of his article, and on the other learned Judges who are sitting in this Court, as a sort of atonement for the gross insult offered to a brother Judge.

Lastly, as to the general character of the article in question, and of the defendant's argument. We have here a gross and aggravated insult offered to a learned Judge. We have that insult justified by no facts, if it could have been so justified, and atoned for by no apology, or palliation ; but openly and defiantly repeated and adhered to, We have done, therefore, with the contempt committed five months ago, and we have before us the contempt committed an hour ago. We have Mr. Brown in this case coming into Court and asserting that a learned Judge has uttered falsehoods. We find a Senator of this Dominion, not hastily and angrily, but, as he himself says and swears to in his affidavit, "after mature consideration," deliberately writing for the public press, that the utterance of that learned Judge in the discharge of his judicial duty is "an idiotic howl," and "rivals the party whoop of the most blatant pot-house politician," and describing the whole judgment as an "insolent slander." Under these circumstances the language of a very recent judgment would seem to be entirely appropriate. In *Regina v. Castro*, L. R. 9 Q. B. 219, the defendants before the Court were two members of the English Parliament, and the contempt charged against them was far less offensive and serious than the contempt which this defendant here not only committed in his publication, but has deliberately repeated and justified before the Court. The Chief Justice of England, Lord Cockburn, in addressing the defendants,

there said, p. 226 :—"Here we find gentlemen of your station and position, gentlemen of education, and members of the Legislature, have condescended to lend themselves to proceedings of this kind, and to hold the language which you have held on these occasions. One can only express astonishment and regret when it is said that this could have been done without consciousness that it was an offence against public justice and against this Court, and might have the effect of creating prejudice with reference to the approaching trial. We can only accept that apology, if we do accept it, at the expense of the understanding of those who made it." In that case a most ample apology was made. We refer also to *Republic v. Oswald*, 1 Dallas 319, and to *Shortt* 263, where it is said, as we say now, that the question has become one, whether the law is to prevail or whether the defendant is to set himself above the law; and the result of those cases will be found in the reports. [MORRISON, J.—Supposing the application fails on the first objection, can the dignity of the Court be vindicated upon Mr. Wilkinson's application?] I have nothing more to say on that point. [MORRISON, J.—It is an important point. Is there any authority?] I have found no direct authority. I find that these applications have been brought up in various ways, and there are differences as to the manner in which such cases have come before the Courts. In one case apparently the Chief Justice of British Guiana himself issued a summons to the defendant to appear: *In re McDermott*, L. R. 1. P. C. 260. There are other cases in which the Attorney-General has moved at the request of the Court, in others he has interfered of his own motion, and in others the application has been made on behalf of the suitor affected. I confess I see no principle upon which any person interested in the administration of justice is not justified in bringing such an offence before the Court. I have not carefully considered that point, however, and I have not cared to consider it, because I can only regard the case in this way—the Court might, if it had thought proper, before allowing this article

to come upon their files, or before listening to this argument, have required the applicant to justify his application and to shew his right to make it, and they might have refused the application, and not have permitted the article complained of to be filed. But when they have received the application, and the libel is before them, and has become a public document on their own files—still more when in the presence of the Court, the contempt has been repeated and justified—the question of authority becomes utterly unimportant. The contempt is there, and the Court are there; it is for the Court to deal with it, and for the Court to do what they may consider right and becoming in the discharge of their high office.

December 27, 1876. HARRISON, C. J.—It is a principle of natural justice that no man shall be condemned till he has had a full opportunity of making his defence: *Bullen v. Moodie*, 13 C. P. 126, affirmed 2 E. & A. 379.

This principle is applicable to proceedings against a person for contempt of Court, which is in the nature of a criminal offence: *Re Pollard*, L. R. 2 P. C. 106, 120.

Whatever the result of the present application may be, it must be admitted that Mr. Brown has had the fullest opportunity of making his defence, and in doing so was allowed to say things which, if he had not been defending himself in person, would not have been permitted to be said in the presence of the Court. His apology was to the effect that if he had used stronger language than was befitting the place or the occasion, the offence was not of his will, but of his misfortune.

Without stopping to enquire as to the sufficiency of this well meant apology, it now becomes our duty calmly and dispassionately to decide as to the legal sufficiency of the cause which he has shewn to the rule *nisi* for an attachment.

Much was said, in shewing cause, about the liberty of the press. Much is generally said in favour of the liberty of the press whenever an application is made to commit for contempt of Court an editor or proprietor of a newspaper.

It is not to be supposed that Judges in these days undervalue the liberty of the press. The press is a powerful engine either for good or evil. Although in the past not entirely free from abuse, its influence has been in the main for good. The liberty which we now enjoy is in a great degree due to freedom of speech and freedom of the press. But this freedom does not involve the right to publish what any man pleases about any other man or set of men in the community. The right must in a state of society have some limits, and it is the province of the Courts of justice, in the absence of legislative action, to define the limits and see that they are respected.

"Every man," in the words of Mr. Justice Fitzgerald in *Regina v. Sullivan*, 11 Cox 44, 49, "is free to write as he thinks fit, but he is responsible to the law for what he writes; he is not, under the pretence of freedom, to invade the rights of the community, \* \* or bring justice into contempt, or embarrass its functions."

The right of free discussion is important; but it is no less important that justice should be freely, fairly, and fearlessly administered by those to whom this great and essential power is under the constitution entrusted.

While the right of public discussion in matters of public interest is important, and should be protected, even while involving the publication of defamatory matter—*Henwood v. Harrison*, L.R. 7 C.P. 606—it is not in the public interest to be permitted, unless conceived in a fair spirit—in the spirit of fair discussion—and not in a spirit of reckless or inconsiderate imputation: *Hedley v. Barlow*, 4 F. & F. 224, 230; *Strauss v. Francis*, Ib. 1107.

No public writer is allowed to impute improper motives to any man unless there be something to justify the imputation—something more than the mere belief of the writer that what he wrote was true: *Campbell v. Spottiswoode*, 3 B. & S. 769; *Hunter v. Sharpe*, 4 F. & F. 983, 997.

It is certainly in the public interest that the proceedings of Courts of justice should be published: *Curry v. Walter*, 1 B. & P. 525; *Wason v. Walter*, L. R. 4 Q. B. 73.



A fair account of proceedings in a Court of justice, not being *ex parte*, but in the hearing of both sides, is generally speaking, a justifiable publication: See per Maul, J., in *Hoare v. Silverlock*, 9 C. B. 20, 23. See also per Coleridge, J., in *Davison v. Duncan et al.*, 7 E. & B. 229, 231.

This privilege has been held to extend to proceedings taking place publicly before an inferior tribunal, such as a magistrate, on the preliminary investigation of a criminal charge, terminating in the discharge by the magistrate of the person accused: *Lewis v. Levy*, E. B. & E. 537.

Whether it extends to the publication of *ex parte* proceedings before a magistrate, or proceedings resulting in the committal of the person accused, is not on the authorities entirely free from doubt: *Rex v. Lee et al.*, 5 Esp. 123; *Rex v. Fisher et al.*, 2 Camp. 563, 564; *McGregor v. Thwaites*, 3 B. & C. 24; *Smith v. Scott*, 2 C. & K. 580.

We are not prepared to join in the sweeping condemnation of police reports, which has been pronounced *obiter* before the benefit arising from these reports had been fully experienced. See per Lord Campbell in *Lewis v. Levy*, E. B. & E. 537, 561.

*Ex parte* proceedings before a magistrate are published every day; but such a thing as an action or indictment founded on a report of such an *ex parte* proceeding is unheard of. And if any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is not whether the report was or was not *ex parte*, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected. Per Cockburn, C. J., in *Wason v. Walter*, L. R. 4 Q. B. 73, 94.

Whatever may have been thought in past times, now-a-days we are agreed on this, that fair and impartial reports of the proceedings in Courts of justice, although incidentally those proceedings may prejudice individuals, are of so great public interest and public advantage that the pub-

lishing of them to the world predominates so much over the inconvenience to individuals as to render their reports highly conducive to the public good ; but the conditions on which the privilege can be maintained are, that the report shall be fair, truthful, honest and impartial. Per Cockburn, C. J., in *Risk-Allah-Bey v. Whitehurst*, 18 L. T. N. S. 615, 618.

It is not allowable for any person, under pretence or colour of the public interest, to publish the preliminary proceedings in any Court of justice, superior or inferior, with comments or observations detrimental to the accused: *Stiles v. Nokes*, 7 East 493 ; *Rex v. Fleet*, 1 B. & Al. 397. See also *Risk-Allah-Bey v. Whitehurst et al.*, 18 L. T. N. S. 615.

Any publication prejudicing, or calculated to prejudice the merits of a cause before its final hearing, is, for well-understood reasons, a contempt of Court: *Huggonson's Case*, 2 Atk. 469, 471.

Thus where the parties to a suit were described as "affidavit men": *Ib.* So the publication of an advertisement reflecting on an answer in the cause: *Cann v. Cann*, 2 Ves. Sr. 520 ; *Ex parte Crow*, 2 T. & Ven. Prac. 231, 232.

The liberty of the press is neither more nor less than the right in the public interest to publish whatever is lawful. While on the one hand we uphold the liberty of the press, we must take care that those who exercise that all-important function shall act under the due sense of the duties they have to perform, and the responsibility under which they exercise those functions. Per Cockburn, C. J., in *Risk-Allah-Bey v. Whitehurst*, 18 L. T. N. S. 615, 619.

It is the duty of those controlling newspapers in all things to submit to and obey the law of the country in which they live. It is equally the duty of Courts and Judges fearlessly to administer the law without regard to the position or power of the delinquent. So long as the press keeps within its proper limits, as recognized by law, it is neither the duty nor desire of Courts to interfere with it. But where the press, under the guise of freedom, pre-

judices the rights of suitors, misrepresents the action of the Courts, or wantonly assails the judiciary, so as to bring the administration of justice into public contempt, it is the duty of the Courts in the public interest to punish the offender.

Judges make no claim to infallibility. They are amenable to the law. There are ample means for correcting their errors and mistakes. And if there be more than error or mistake, if there be corrupt conduct, there is no want of adequate remedy.

There is therefore the less excuse for any person suffering from a real or fancied grievance taking the law into his own hands. If we were to concede the right of a litigant, witness, or stranger to a suit or other legal proceeding, to vituperate a Judge for something said or done by him in the discharge of duty, we should also have to concede the right of the same person, for the same real or fancied grievance, to administer personal violence. And this is not to be thought of in any country having an independent judiciary—one of the bulwarks of civil liberty.

Judges are not liable either civilly or criminally for words spoken in office: *Rex v. Skinner*, Lofft 55. See also *Kemp v. Neville*, 10 C. B. N. S. 523.

It was at one time supposed that if a Judge abuse his judicial office by using slanderous words, maliciously and without reasonable or probable cause, the remedy was by action: *Thomas v. Churton*, 2 B. & S. 475, 479. But the contrary is now held: *Fray v. Blackburn*, 3 B. & S. 576. See further *Seaman v. Netherclift*, L. R. 1 C. P. D. 540, 544.

This doctrine in all its fulness applies not only to the superior, but to the inferior Courts of justice: *Scott v. Stansfield*, L. R. 3 Ex. 220.

It is essential in all Courts that the Judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favour and without fear. This provision is not for the benefit of a malicious or corrupt Judge, but for the benefit of the public, whose interest it is that Judges should be at liberty to exercise their functions with

independence and without fear of consequences. Per Kelly, C. B., *Ib.* 223.

If a Judge of the Superior Court be shewn to have acted corruptly in the discharge of his official duty, the person aggrieved, although without remedy by action, is not wholly without remedy, and certainly not so far without remedy as to render it justifiable or excusable for him to punish the Judge in any manner he may think convenient or necessary.

If such a state of things were permitted in any community, the office of Judge could only be held in that community by the most desperate or most despicable men in the community.

It is often the unpleasant duty of Judges, in the necessary discharge of their duties, to animadvert on the conduct not only of litigants, but of witnesses and others who are not directly parties to the litigation. If, in such cases, Judges were only permitted to speak at the risk of personal violence or personal abuse, the public would be the real sufferers.

It was at one time questioned whether a publication, in other respects privileged, which reflects on the character or standing of a person not a party to the litigation, is privileged: *Lewis v. Clement*, 3 B. & Al. 702. But it is now held that where the language used is not wholly irrelevant, the fact that it embodies reflections on a third party does not deprive it of the privilege: *Ryalls v. Leader*, L. R. 1 Ex. 296.

The judgment of the Court, consisting of several Judges, is the result of the opinions expressed by the several Judges, or the majority of them. That result may be attained by different Judges for different reasons. The honest expression of these reasons, whether the Judge be in the majority or the minority, whether reflecting on parties to the suits, witnesses, or strangers, whose names necessarily appear in the proceedings, must be equally privileged and equally protected.

Vituperation of Judges for words spoken by them in the



discharge of duty is, and always has been, deemed a contempt of Court, punishable summarily by attachment.

The process of attachment for contempt must necessarily be as ancient as the laws themselves, for laws without a competent authority to secure their administration from disobedience and contempt would be vain and nugatory. A power, therefore, in the supreme Courts of justice to suppress such contempts by an immediate attachment of the offender, results from the first principles of judicial establishments, and must be an inseparable attendant upon every superior tribunal. See per Parke, B., in *Miller v. Knox*, 4 Bing. N. C. 574, 614.

The power is now held to exist in every Court of record, whether of superior or inferior jurisdiction. If an inferior Court attempt to usurp jurisdiction, a superior Court may interfere and prevent it: *Ex parte Pater*, 5 B. & S. 299; *Ex parte Lees*, 24 C. P. 214; *Re Wallace*, L. R. 1 P. C. 283.

While the power of committing for contempt resides in any Court, it is the privilege of that Court to determine on the facts, so that no higher tribunal can interfere with its finding on the facts: *Re Clarke*, 7 U. C. R. 223; *McDermott v. Beaumont*, L. R. 2 P. C. 341.

The principles which should govern a Court of justice when the power of punishing for contempt is invoked, are nowhere more accurately or more luminously expressed than in the opinion prepared by Chief Justice Wilmot, in *Rex v. Almon*, *Wilmot's Opinions* 243.

This opinion, although not actually delivered in Court, for reasons not necessary to be mentioned, and therefore *per se* not absolutely binding as authority, has been in several cases adopted as containing a true exposition of the law. See *Miller v. Knox*, 4 Bing. N. C. 574, 614; *Ex parte Turner*, 3 M. D. & DeG. 523, 534.

In this opinion will be found answers to some of the arguments addressed to us in the present case. I cannot therefore do better than quote some of the portions of it which are directly applicable :

“The issuing of attachments by the Supreme Courts

of Justice in Westminster Hall, for contempts out of Court, stands upon the same immemorial usage as supports the whole fabric of the common law; it is as much the *lex terræ*, and within the exception of Magna Charta, as the issuing of any other legal process whatsoever": p. 254.

Colonial Courts, it may be mentioned, possess the same power of commitment for contempt as the Supreme Court of Justice in Westminster: see *McDermott v. Beaumont*, L. R. 2 P. C. 341. See further *Rainy v. The Justices of Sierra Leone*, 8 Moore P. C. 47, 54, and *Hughes v. Porral*, 4 Moore P. C. 41.

"The arraignment of the justice of the Judges, is arraigning the King's justice; it is an impeachment of his wisdom and goodness in the choice of his Judges, and excites in the minds of the people a general dissatisfaction with all judicial determinations, and indisposes their minds to obey them; and whenever men's allegiance to the laws is so fundamentally shaken, it is the most fatal and most dangerous obstruction of justice, and, in my opinion, calls out for a more rapid and immediate redress than any other obstruction whatsoever; not for the sake of the Judges, as private individuals, but because they are the channels by which the King's justice is conveyed to the people. To be impartial, and to be universally thought so, are both absolutely necessary for the giving justice that free, open, and uninterrupted current, which it has, for many ages found all over this kingdom, and which so eminently distinguishes and exalts it above all nations upon the earth": *Rex v. Almon*, *Wilmot's Opinions*, 255, 256.

"By the word Court, I mean the Judges who constitute it, and who are entrusted by the constitution with a portion of jurisdiction defined and marked out by the Common Law, or Acts of Parliament": *Ib.*

There are three different kinds of contempt punishable by attachment:—

1. Scandalizing the Court itself.
2. Abusing parties who are concerned in causes.
3. Prejudicing mankind against persons before their cause is heard. See *Huggonson's Case*, 2 Atk. 471.

It is contended that in the publication contained in the *Daily Globe* of the 8th of July last, and repeated, with slight additions, in the *Weekly Globe* of the 14th of July last, the accused is guilty of all three of these descriptions of contempt.

The accused, while admitting the publications and attempting to justify them, has argued that the rule ought not to be made absolute, on several grounds, preliminary and otherwise, which it now becomes my duty to notice in detail.

The first is, that at the time of the publications of the 8th and 14th of July last, the information had not been filed, and so there was no suit pending. The object of preventing, and, if necessary, of punishing publications calculated to affect prejudicially the interest of suitors, is, that there may be a fair trial—that the stream of justice shall be allowed to flow unruffled by extraneous influences. Everything that can in reason be urged against a publication between the date of the filing of the criminal information and the date of the trial may be quite as strongly urged against a publication between the date of the rule allowing the information to be filed and the actual filing of the information. I do not mean to say that the mere permission to file the information should for ever prevent discussion about it. But, for a reasonable time after the leave given, there should be no discussion prejudicing the position of the litigants—that is, until it be seen whether the person to whom the leave is given intends to avail himself of it. Should he avail himself of the leave, publications between the granting and the filing of the information which would be injurious if made after the filing of the information, must be equally injurious although before the filing of the information. The Courts have at all times, in accordance with the supreme demands of justice, viewed this branch of the law in a broad and liberal spirit.

In *Rex v. Clement*, 4 B. & Al. 218, it was held that a Court of general gaol delivery has the power to make an

order to prohibit the publication of the proceedings pending a trial likely to continue several successive days, and to punish disobedience of such order.

In *Ex parte Turner et al.*, 3 Mont. D. & DeG. 523, 544, it was held that parties are not at liberty to attack each other with abuse or libellous statements, as to what has been done in any particular litigation, although that litigation had been brought to a close.

If there be power to punish publications as to past litigation, there must be power to punish after litigation has been really commenced by the invocation of the leave of the Court, which leave has been granted, and, it is to be presumed, is to be followed by the formal proceedings necessary to bring the accused to the bar of justice for trial. The leave here was granted on the 29th of June. The first publication complained of was on the 8th of July following. I think it must be held that at the time of the publication there was litigation pending, so as to make it a duty not to interfere with the course of that litigation.

The second objection is, that even if there were pending litigation, the application is too late. There is no law which determines the time within which such an application as the present must be made. It may be that the defendant might have brought the matter to the attention of the Court before Trinity term last—that is, before the information was filed. On this point I give no opinion. But he appears to have thought that he could not do so till the information was filed and subpoena issued and served. The information was not filed till late in Trinity term, and the subpoena only reached him on the last day of that term. It was then too late for him to apply to the full Court before Michaelmas term. He might have applied to a Judge sitting under the Administration of Justice Act for the full Court; but I do not think such a Judge represents the full Court, so as to enable him to punish a person for contempt of the full Court. See *Van Sandau v. Turner*, 6 Q. B. 773, 777; *Ramsay's Case*, L. R. 3 P. C. 427.

It is not necessary to decide the question as to the power



of a Judge sitting under the Administration of Justice Act to punish for contempt of Court, as represented by himself.

The case of *The Republic v. Oswald*, 1 Dallas 319, cited as an authority to prove that such applications as the present should be promptly made, and if not promptly made should not be entertained, does not support the position. In that case a rule to shew cause had been issued, returnable peremptorily on a particular Monday. On that Monday the defendant appeared and asked that the rule might be enlarged, as he had not had a reasonable time to prepare for the argument. But this was opposed. McKean, C. J., said, p. 322: "I know not of any instance where the delay of a term has been allowed in the case of an attachment. One reason of such a summary proceeding is to prevent delay. Let cause be now shewn." There was no question but that the application for the rule *nisi* was made in sufficient time. The only question was, whether the defendant should be allowed to enlarge that rule from one term to another for the purpose of answering it. And this was refused.

I cannot undertake, in the absence of all authority on the point, to lay down any fixed rule as to the time within which such an application as the present must be made. Each case must depend on its own circumstances.

It must rest in the discretion of the Court to say whether in the particular case, under all the circumstances, the application is made in time. I think, under the circumstances of this case, the application was made in sufficient time.

The third objection is, that the articles complained of make no reference to the subject matter of the criminal information *sub judice*, but merely to matters formally disposed of by the Court.

In *Huggonson's Case*, 2 Atk. R. 471, Lord Hardwicke said: "There cannot be anything of greater consequence than to keep the stream of justice clear and pure, that parties may proceed with safety both to themselves and their characters." This language has been often quoted with marked

approval. See *Ex parte Jones*, 13 Ves. 237; *Settler v. Thompson*, 2 Beav. 129; *Felken v. Herbert*, 10 Jur. N. S. 62; *Tichborne v. Mostyn*, L. R. 7 Eq. 55, note; *Regina v. Shepworth*, L. R. 9 Q. B. 230.

In *Daw v. Eley*, L. R. 7 Eq. 49, 59, Lord Romilly said, in reference to the cases cited: "The principle is quite well established in all these cases, that no person must do anything with a view to pervert the sources of justice, or the proper flow of justice; in fact, they ought not to make any publications, or to write anything which would induce the Court, or which might possibly induce the Court or the jury, the tribunal that will have to try the matter, to come to any conclusion other than that which is to be derived from the evidence in the cause between the parties, and certainly they ought not to prejudice the minds of the public beforehand by mentioning circumstances relating to the case," &c.

Where the publication is one which affects only the character or position of a litigant, and the application is for a criminal information, the Court, if satisfied that the publisher of the article was not influenced by personal malice, and that the article could not exercise any prejudicial influence, may refuse leave to file the information: *Ex parte Smith*, 21 L. T. N. S. 294.

But where the application is to commit the publisher for contempt, and the Court is satisfied that the article was calculated to have the effect imputed to it, the mere ignorance of the writer that such would be the effect, or his mere intention not to offend, is no sufficient excuse: *Huggonson's Case*, 2 Atk. 472; *Ex parte Jones*, 13 Ves. 237; *Settler v. Thompson*, 2 Beav. 129; *The People v. Wilson*, 16 Am. 528, 531, 532.

Men must be taken to intend the natural consequences of their acts. Where the writing is calculated to prejudice a litigant, the writer must be held to have intended that consequence. The defendant Wilkinson was accused of having published three libels reflecting on Senator Simpson. The Court, looking at the alleged libels, saw fit to allow a

criminal information to be filed as to two of them. It thereupon became in the power of Senator Simpson to bring Mr. Wilkinson to trial as to these two libels. Whether libels or not, in the event of a trial with a jury, would be a question for a jury. See *Odger v. Mortimer*, 28 L. T. N. S. 472.

Before the trial, for any journalist to refer to the accused as a libeller would certainly be calculated, among those who read the article in the newspaper, to create some prejudice against the accused. If the newspaper were shewn to have been one of large circulation and of considerable influence, the probabilities of prejudice against the accused would be thereby increased. To write editorially in such a journal of the accused, that he was not only the author of the libels in question, but of scores of others against the same senator, is certainly calculated to arouse considerable prejudice against the accused. Now, this appears to me to be in effect what was done by Mr. Brown in the articles which Mr. Wilkinson has on this application brought before the Court. In each of them occurs this passage: "It may be perfectly sound law to decide that because Mr. Simpson's counsel selected only three out of a score of libels discharged at him by the defendant, and did not proceed against him for all of them, or because his counsel refused to notice slanders dragged in neck and heels into the pretended justification of the defendant, that had no connection whatever with the three libels complained of; therefore Mr. Simpson was cut off from the proceeding by criminal information, and must seek his redress against his libeller by the ordinary course of indictment." If there were no more in the articles affecting Mr. Wilkinson than what I have quoted, I would be compelled to hold that they are calculated prejudicially to affect him. And this being, in my opinion, sufficient, I, in view of the anticipated trial, forbear to notice any more so far as the present part of the application is concerned.

The fourth objection is, that Mr. Wilkinson has pub-

lished, and repeated the publication, that the *Globe* articles did not affect him. Mr. Wilkinson, in the *West Durham News* of July 14th, 1876, referring to the article now complained of, said: "Of one thing we feel certain, the wicked and foolish article referred to will fail of its intention to prejudice our case in Court in the least, while it will greatly help it before the country, so that on this head we should have no fault to find with it."

In the issue of the same newspaper, dated the 21st of July, 1876, he said: "Rumour has it that at a meeting of the Law Society it was decided to take steps to punish Mr. Brown for his impudent article. The rumour lacks substantiation, and we should judge that likely the thing will be treated with silent contempt."

And in the issue of the same newspaper, dated the 28th of July, 1876, he said: "We would not like to see a heavy fine imposed upon Mr. Brown, and he made to appear before his party as a martyr, but we should like to hear what his legal adviser would say in answer to a rule to shew cause why an information should not issue against him for contempt of Court, and if his grounds are not sufficient, a fine of one shilling imposed. It is all he could afford."

Mr. Wilkinson, in reference to these paragraphs, now says under oath that the statements were made in perfect good faith, and he then thought that the articles in the *Globe* of the 8th and 14th of July last would not prejudice his case, believing that they were of such an abusive nature as to carry their own condemnation to the thinking and unprejudiced portion of the community, but subsequently was led to believe, and when he made his affidavit on the 28th of September last for this application did verily believe, from a variety of circumstances, conversations, and articles in certain newspapers, that the fair trial of his cause had been prejudiced by the articles in the *Globe* newspaper, and is now further convinced of this from what has since appeared in the *Paisley Advocate* newspaper, which was recently brought to the attention of the Court.

Mr. Wilkinson's belief at one time that the articles



would not prejudice his trial, is no more an answer to the application than Mr. Brown's belief, when he published the articles, that they would not have that effect. The question is not, whether the articles had that effect, or whether the parties principally concerned believed the articles would have that effect, but whether the language used was calculated to have that effect. I have already held, in answer to the third objection, that the articles were calculated to have that effect; and this, so far as I am concerned, disposes of the fourth objection.

The fifth objection is, that Mr. Wilkinson in his newspaper commented on the judgment of the Court and distorted its meaning. It is unnecessary at length to refer to the quotations which are given from Mr. Wilkinson's journal in support of this objection. Assuming that they in point of fact sustain the objection, the question remains, whether in point of law the objection is a good one. No authority was cited in support of it. In the absence of authority, I cannot hold it to be good. If Mr. Brown has offended, it is no reason why he should not be punished, that the applicant has in some similar manner offended. The offence is not against the applicant, but against the Court: *Felkin v. Herbert*, 10 Jur. N. S. 62.

It does not relieve the particular person accused to shew that others are no better than himself. The contempt, if any, of Court, in the case of a particular offender, is not to be purged by shewing that there is more than one offender. If the applicant were asking leave to file an information for some alleged libel on himself, such an argument might have some weight. But where the libel complained of is not one simply on the applicant but on the Court, the case must be disposed of on higher and different considerations. This objection, if the libel be one scandalizing the Court, is not good in point of law. Whether the libel be one scandalizing the Court I shall hereafter consider.

The sixth objection is, that the applicant, after the delivery of the judgment and before the articles complained of, attacked Mr. Brown personally in his (the applicant's)

newspaper, and has ever since continued to slander and vilify Mr. Brown. Personal attacks by public men on each other are much to be deplored. It is to be hoped that the day will come when public questions will if possible be discussed in the press with less personal abuse than at present prevails. It will not, however, advance the reform by endeavouring to ascertain who commenced the system which needs reform. Without doubt there are times when personal delinquencies are of such a character that reference to them in public discussion is unavoidable. But what is desired is as large a discussion as possible on the merits of public questions with as little reference as possible to those by whom such questions are discussed. The remedy is in the hands of our public men. If leading public men, including leading newspaper proprietors, were steadfastly to set their faces against that evil which all admit to some extent to exist, there would be a better feeling among our public men, and the public interest would not be thereby impaired. The profession of a journalist is deservedly respected in this Province, and would not be less respected if some such change as suggested were to take place. But in the present case I am forced to deal with the effect of the existing system as regards the present application. If the application were for leave to file a criminal information, on the ground that Mr. Brown had libelled Mr. Wilkinson, one answer, and a good one, would be that Mr. Wilkinson, by attacking Mr. Brown in the newspaper for the alleged libel, had chosen his tribunal: *Ex parte Beauclerk*, 7 Jur. 373; *Regina v. Lawson*, 1 Q. B. 486.

So, if the application were to punish Mr. Brown by way of process of contempt for the publication of a libel affecting the applicant only: *Daw v. Eley*, L. R. 7 Eq. 49, 61. See further *Vernon v. Vernon*, 23 L. T. N. S. 696.

But if the publication complained of, on production and inspection, appear to be not only defamatory of the applicant as a suitor, and so technically a contempt of Court, but scandalizing the Court in which the application is

made—in other words, to partake of the three descriptions of contempt mentioned by Lord Harkwicke in *Huggonson's Case*, 2 Atk. 471—it would be impossible for the Court, I think, in the interest of the public, to allow such an answer to prevail. It is in the power of the Court, although the power is rarely exercised, of its own motion to take notice of a publication scandalizing the Court; but the Court cannot, in my opinion, consistently with the duties which it owes to itself and the public interests which are in its keeping, avoid doing so when the publication is not only placed on the files of the Court in an existing suit, but broadly attempted to be justified in the face of the Court by the writer of it. In such a case the mere acquiescence or misconduct of the applicant cannot, in my opinion, be any answer to an admitted contempt of Court, affecting not only the rights of the litigant, but the dignity of the Court itself.

I shall now proceed to enquire whether the publications in question can be properly said to be of the heinous character last described—that is, to scandalize the Court.

The temperate and respectful discussion by the newspaper press of the determinations of our Courts of justice is not to be interdicted, but the mere invective and abuse, and still more, the imputation of false, corrupt, or dishonest motives to those who are engaged in the administration of justice, is not to be tolerated. See *Shortt on Literature* 361, 362. See further *Risk Allah Bey v. Whitehurst et al.*, 18 L. T. N. S. 615.

In *Rex v. White*, 1 Camp. 359, note, Grose, J., said: “It certainly was lawful with decency and candour to discuss the propriety of the verdict of a jury or the decisions of a Judge, and if the defendants should be thought to have done no more in this instance, they would be entitled to an acquittal; but, on the contrary, they had transgressed the law, and ought to be convicted, if the extracts from the newspaper, set out in the information, contained no reasoning or discussion, but only declamation and invective, and were written, not with a view to elucidate the truth, but to injure the character of individuals, and to

bring into hatred and contempt the administration of justice in the country."

In *Rex v. Watson et al.*, 2 T. R. 199, 205, Buller, J., said "Cases may happen in which the Judge and the jury may be mistaken. When they are, the law has afforded a remedy; and the party injured is entitled to pursue every method which the law allows to correct the mistake. But when a person has recourse either by a writing like the present, by publications in print, or by any other means, to calumniate the proceedings of a Court of justice, the obvious tendency of it is to weaken the administration of justice, and in consequence to sap the very foundations of the constitution itself."

In *Risk-Allah Bey v. Whitehurst*, 18 L. T. N. S. 615, 620, Cockburn, C.J., said to the jury: "If you think there has been rashness and recklessness in quarrelling with the verdict of acquittal which has declared the man to be innocent, and especially under a criminal prosecution, your verdict will be based on those considerations."

In *The People v. Wilson*, 16 Am. 528, Lawrence, C. J., said: It is in the power of the press honestly, fairly, and temperately to criticise the Courts of justice in regard to cases which have passed from their jurisdiction, so long as the action of the Court is correctly stated, and the official integrity of the Court not impeached.

In the same case, at p. 535, the same learned Judge said: "We wish to call the attention of the press to the limits which circumscribe their comments on judicial proceedings, and to remind them of the obligations imposed upon them by the great power which they confessedly wield. Especially do we desire to keep the judicial reputation of the State free from the appearance of dishonour, and to prevent the growth of that distrust in the minds of our own people that would certainly follow the circulation of articles like the one under consideration if permitted to go unrebuked."

The two articles now before the Court are substantially the same. The one was published in the *Daily Globe* of the 8th of July, 1876; the other in the *Weekly Globe* of



the 14th of July, 1876. The only difference between them is the insertion in the *Weekly Globe* of two paragraphs relating to the amounts of the funds raised for party purposes by the Reformers and Conservatives at the general election of 1872. These do not, so far as the present application is concerned, qualify or materially affect the first publication.

Let me, therefore, see if the article, as first published, was a temperate and respectful discussion of what had taken place in a Court of justice; or whether it was mere invective and abuse, containing the imputation of false, corrupt, or dishonest motives to those engaged in the administration of justice.

It is headed, "Justice Wilson on the War Path." It opens with a very proper tribute to the judicial system of Ontario. It properly refers to the application in *Regina v. Wilkinson*, for leave to file a criminal information as being a preliminary step in the cause, not affecting its ultimate decision on the merits. It incorrectly assumes that the opinion of the Chief Justice was the decision of the Court on the application, and incorrectly assumes that the opinion delivered by Mr. Justice Wilson was after the pronouncing of the decision of the Court. It charges Mr. Justice Wilson with having expressed his views with a freedom of speech, and an indifference as to the evidence before the Court, and an indulgence in assumptions, surmises, and insinuations, in the belief of the writer, totally unparalleled in the judicial proceedings of any Canadian Court. It charges the learned Judge with not being content to deal with the legal aspects of the application as a preliminary step towards the formal trial that was to follow, but as having favoured the world with his views on every subject directly or indirectly connected or not connected at all with the matter before the Court. It charges him with having assumed to be true, without a particle of evidence to prove them so, scraps of articles culled by the defendant from newspapers. It charges him with having distorted the meaning of a letter before the

Court. It charges him with having stated what he knew not to be true. It charges him with having disregarded evidence which, it is alleged, was before him. It charges him with having been unjust and reckless in his treatment of the applicant. It says the Bench has descended low indeed when a Judge of the Queen's Bench condescends to take up the idiotic howl, and rivals the dirge of the most blatant pot-house politician. It speaks of his judgment as an outrage from the Bench. It charges him with having been guilty of slanders and insults, and undertakes to answer them, even if the dignity of the Bench is ruffled in the contest. It concludes by the assertion that Mr. Justice Wilson's offence was so rank, so reckless, and so utterly unjustifiable that soft words would have poorly discharged the writer's duty to the public.

Of the many publications which appear in the reports as attacks on the Bench, I know of none worse than the article now before us. It is not only full of vituperation, but assumes fiction to be fact, and on the strength of a foundation thus, in part at least, constructed, mercilessly assails a Judge of great experience, acknowledged ability, and undoubted integrity, who, in the fearless discharge of official duty, felt constrained to use language which, although strong, cannot fairly be said to be irrelevant to the matter before the Court. The Judge thus assailed is, in short, charged with being so ignorant or vicious as to disregard evidence, so corrupt as to distort evidence, so corrupt as to suppress evidence, and so lost to all sense of propriety as to utter deliberate falsehoods in his official judgment.

The assertion, express or implied, that not only Mr. Brown's letter of the 15th of August, 1872, but his explanation published in the *Daily Globe* of the 27th September, 1875, were before the Court, and in the hands of the learned Judge thus assailed, has no foundation in fact.

The learned Judge thus recklessly assailed, of all the Judges in the Court, was, we believe, the least concerned at the attack, and was willing to let it quietly pass into the shades of oblivion. None, I am sure, regrets more than

himself that the publication has not been allowed without notice to take this course. But now that it has been formally brought before the Court, is admitted, is in no manner apologized for, but on the contrary is repeated and attempted to be justified where no justification is possible, the Court would, I think, be derelict of duty if it any longer affected to disregard it.

It is argued by Mr. Brown that the publication in question is not an attack on the Bench, but on Mr. Justice Wilson, made by him in necessary and proper self-defence, and that under any circumstances the article was written by him in the discharge of duty as a public journalist as to a subject of public interest, and so is privileged.

Let it be understood, once for all, by the press of this Province that a defamatory attack upon a Judge of a Superior Court for a judgment pronounced by him with other Judges in Court, is more than a contempt of the Judge who is maligned—that it is a contempt of the Court of which he is a Judge; and that the Court has the power to punish an affront thereby offered to the Court.

The Courts have always considered it a contempt of the authority of the Court for any person to abuse or vilify the officer; however subordinate, who is acting under it. Per Wilmot, C.J., *Wilmot's Opinions* 270.

The offence cannot be the less a contempt of Court because the affront is offered to the Court through one of the Judges of the Court. To hold, in the case of a Court consisting of three Judges, that unless a vituperative article affected all the members of the Court there would be no contempt of Court, would be to enable any person having the control of a newspaper to single out each Judge of the Court at a time, and in the course of time assail the whole Court with impunity.

The statement of such a proposition is its own answer. It may perhaps merit a less punishment to libel a single Judge, in Court or out of Court, than to libel the whole Court; but the quantum of the offence does not vary the mode of prosecuting it. “It is an offence *ejusdem generis*

although *inferioris gradus*." Per Wilmot, C. J., *Wilmot's Opinions* 267.

One great mistake which Mr. Brown made in writing the reckless and intemperate article now before the Court was, to assume that the opinion delivered by the Chief Justice was the judgment of the Court. Each Judge is entitled to express his own opinion, whether agreeing with or dissenting from the majority, and the result of these opinions, and nothing short of the result of these opinions, constitutes the judgment of the Court. Mr. Brown had no more right to assail Mr. Justice Wilson for the expression of his opinion on the occasion of the delivery of judgment, than to assail myself, the presiding Judge of the Court. It so happened that I was the first to deliver my opinion. But each member of the Court was equally entitled to the protection of the law for anything honestly said by him in the discharge of public duty.

If a Judge of the Superior Court, in the discharge of public duty, act corruptly, the law provides redress for those aggrieved. It cannot be admitted that the publication was either for the necessary or proper defence of Mr. Brown. Journalists, as well as others, are prevented in a country where law is properly administered from taking the law into their own hands. A law which would permit a person aggrieved by an expression of opinion by a Judge in the discharge of duty to chastise the Judge, would be worse than no law. Whether the chastisement take the form of personal violence or vituperative language, there is equally an offence against law. The language used by Mr. Justice Wilson in reference to Senator Simpson, and the letter supposed to have been received by him from Senator Brown, although severe, cannot be said to be irrelevant. If I had seen my way clear to the use of such language as to the applicant then before the Court, I think I would have wholly refused his application. But this was a matter as to which Judges might fairly differ in opinion. If, under the circumstances, Mr. Brown had, as suggested by Mr. Robinson in his able argument, written and pub-



lished a letter in temperate language, stating facts and pointing out that so far as he was concerned the learned Judge had drawn erroneous conclusions from the facts before him, Mr. Brown would, in my opinion, have stood before the Court in a very different position to what he does to-day. No Judge objects to have his errors, or supposed errors, whether of fact or law, honestly and temperately pointed out. But it is a very different thing to impute base motives to the Judge, impugn his honesty, and proclaim him guilty of wilful falsehoods in his judicial utterances.

All that now remains of the cause shewn to the rule is the contention that Mr. Brown, in publishing these articles, did no more than his duty as a public journalist, and so is privileged. I have already expressed my views as to the real and supposed liberty of the press. I have no wish to repeat these expressions. They exclude all idea of privilege on the present occasion. The argument is, that considering the notoriety of what is called the Big Push Letter, and the prominent position of the writer of it in one of the political parties of the country, that it was for the public interest that the articles in question should be written, although severely reflecting on one of the Judges of a Superior Court of law in respect of a judgment delivered by him in Court. But it is not for the public interest that any part of our judiciary, who Mr. Brown admits are worthy of the highest admiration, should be recklessly assailed in the public press. There is no privilege for any man in Canada, under the pretext of the public good, rashly to assail in the public press any of our Judges for his conduct on the Bench, and to impute to the Judge assailed conduct so wicked and corrupt as to render him wholly unfit to occupy the distinguished and responsible position of a seat on the Bench. The remedy for such a state of things, if ever it should unfortunately arise in our country, is wholly different. But whatever may happen, the Judges must be kept high above the struggles of party warfare and party rancour. Judges

have no political bias. They know nothing as Judges of political parties or political contests, except when forced on their attention in controverted election trials. They are neither Reformers nor Conservatives. It is a matter of no interest whatever to them which of the political parties for the time being is in office and which is out of office. The moment a man consents to accept a seat on the Bench, his mere party predilections are left behind, and should, if possible, be for ever abandoned. He must henceforward do justice to all men, and so to both political parties. He cannot do so if he has a leaning to either; and his usefulness as a Judge must be impaired more or less if either political party entertain the belief, well or ill founded, that he is a prejudiced or unjust Judge. The office of a Judge of the Superior Courts, either at law or equity, in this Province is an arduous one. Judges, of all men, in the discharge of their high and arduous duties, need not only the protection of the law, but the genuine sympathy of all the honestly disposed classes of the people. One of the greatest blessings which can be conferred upon an intelligent people is an able and independent judiciary. One of the greatest curses would be a weak or corrupt judiciary. One of the greatest calamities would be the belief on the part of the people, or any considerable portion of the people, that the judiciary is either weak or corrupt. The labours of the Judge permeate all ranks of society. They ascend to the occupants of the palace, and descend to the hearth of the humblest cotter in the land. All men and all parties stand before the majesty of the law on an equal plane. All have, in the eye of the law, equal rights. All have property, reputation, or life demanding protection. All have the right to the protection of the blessings conferred upon them. And for the safety of society, all must feel that all their rights will be protected by the judiciary.

It would not, in my opinion, be in the public interest that the author of the publications now before us should go altogether unpunished. Individually, I bear him no ill-will. I admit his talents. Socially, I respect him. I

respect his position as a public journalist, a prominent public man, and a senator of the Dominion. But the higher the station of the offender, the greater the necessity for his being made to bend and submit to the law. I am sincerely sorry to see Mr. Brown in the position where he has voluntarily placed himself, and from which, although ample opportunity was afforded him, he refused to extricate himself. If I were to consult only my own feelings as an individual I would forbear to punish. But when I consult my duty as the presiding Judge of this Court, the line of my duty appears to be so clear that I cannot refuse to see and follow it. It is not because a line of duty is disagreeable that a Judge is to shrink from following it to all its consequences.

In my opinion the rule should be made absolute.

MORRISON, J.—I very much regret, in a matter of this nature, I have the misfortune to differ from the learned Chief Justice as to what ought to be the result of this application, but after the best and fullest consideration I have been able give to the subject, I have arrived at the conclusion that we ought not to make absolute the rule.

My opinion is not based upon the ground that the publication is not a contempt of the Court, for I fully concur in the law in that respect, as expressed by the learned Chief Justice, as well as the observations upon the character and tendency of the libellous matter it contains. The grounds of my judgment are shortly these: 1. That the complaint and application of Mr. Wilkinson, so far as it respects himself, is too late in point of time. 2. That the applicant has failed to sustain the constructive contempt, founded on the allegation that the article in question was calculated to prejudice him in his trial upon the criminal information granted by this Court, for the libellous matter reflecting upon Senator Simpson. And, lastly, that the applicant having failed to sustain his own complaint, is not entitled, under the circumstances, or under colour of such a complaint, to ask the Court to punish, at his suggestion, the publisher of the article, upon the ground that it contains a direct contempt of the Court itself.

As to the first ground, an application seeking the exercise of this summary and extraordinary power of the Court, to punish for a constructive contempt, necessarily *per se* points to its being promptly made, and the person offending being promptly called to account. In every instance where I find this remedy for a constructive contempt mentioned, it is referred to as a speedy one, and in all cases where it has been resorted to the complaint has been made immediately, or at the earliest moment. It may be, as stated during the argument, that there is no decision indicating within what period after the commission of such a contempt an application of this nature should be made, or after what period it should be refused. The absence of any such decision can, I think, be easily accounted for by the parties aggrieved having brought their complaints promptly before the Courts, and in the few cases where the contempts have been against the Courts themselves, they have taken immediate notice of them.

As I have already intimated, the very reason of the thing—the nature of the offence, the object to be attained, and the obvious necessity of immediate punishment—suggest that the attention of the Court should be directed to the alleged contempt promptly—in other words, during the sitting of the Court, if committed during that period, or if not, then in the term following the contempt. In the present case the article appeared in the *Daily Globe* of the 8th July. The term following commenced on the 28th August, affording ample time for preparation, and the whole of Trinity Term for moving a rule.

Mr. Wilkinson, in his affidavit filed in reply to Mr. Brown's, states as an excuse for the lateness of his application, that he was not aware until September that the *Globe* articles would have a prejudicial effect on his expected trial. I am not prepared to give effect to that excuse. The opinion Mr. Wilkinson entertained of the article in question shortly after its publication, he published in an editorial in his own paper, in which article he wrote: "Of one thing we feel certain, the wicked and foolish article



referred to will fail of its intention to prejudice our case in Court in the least, while it will (meaning one of the said articles in the *Globe*, now complained of) greatly help it before the country; so that on this head we should have no fault to find with it." And in his affidavit stating his excuse he says he made that statement in perfect good faith, believing that the article in the *Globe* would not be prejudicial, and, as he still believes, that the *Globe* articles carry their own condemnation, but that subsequently when he made his affidavit on the 28th September, he believed from a variety of circumstances, conversations, and articles in certain other newspapers, that the fair trial of his case had been prejudiced, and that he was further convinced of the same from what appeared in the *Paisley Advocate* on the 30th October, a paper published in the county of Bruce, a month after his affidavit of the 28th September. It was not denied during the argument, and it appears from the affidavits and papers filed, that the applicant, who is the proprietor of the *West Durham News*, published articles in that paper, commenting on the judgment of the Court, and the matters contained in the article complained of, inducing and provoking other papers and their readers and correspondents to discuss the subject matter of the article in the *Globe*, and if these discussions resulted in the production of articles prejudicial in any way to the applicant, he is himself partly to blame. We cannot shut out of view that the controversy assumed a strong political character, and it is unnecessary to make any observations upon the unmeasured terms and acrimony with which such discussions are carried on.

In the case of *Rex v. Bishop*, 5 B & Al. 612, a rule *nisi* being granted for a criminal information against the defendant for corrupt practices as a justice, where it appeared that the circumstances upon which the motion was based happened long previous to the application, the complainant accounting for the delay, by alleging that he had no knowledge of the facts until shortly before the application, it was objected to as too late. Abbott, C. J., in discharging

the rule said, p. 613, "If we were to admit this excuse we should entirely frustrate the very useful rule to which we have been referred."

In *Rex v. Barry O'Meara*, 4 B. & Ad. 869, Sir Hudson Lowe, on the 11th of February, the last day but one of the term, obtained a rule *nisi* for a criminal information against O'Meara for libels in a work called "Napoleon in Exile." It appeared that the first edition of the work was published in August and a fifth edition in November. The Court held the application was too late and discharged the rule.

I need hardly say that much greater promptitude is obviously required in cases of this nature than in criminal informations. It is quite true that it is a matter of discretion with the Court, but it seems to me that if we now, in the exercise of that discretion, decide that this application of Mr. Wilkinson is not too late, in no case could we refuse a similar application after a like lapse of time. Therefore, thinking as I do that it is essential to an application of this nature that the party aggrieved should move promptly, and as this applicant allowed a term, as I have already shewn, to pass after the commission of the alleged contempt, it is such a delay that in my opinion on that ground alone we should refuse to grant his application.

Then as to the second ground, assuming that in point of time no objection could be raised. I have carefully read the article, and I cannot see or satisfy myself that it contains any statement, as far as Mr. Wilkinson is concerned, that would warrant us in holding it as calculated or likely to prevent Mr. Wilkinson having a fair and impartial trial. Mr. Wilkinson has not pointed out in his affidavits, nor did the learned counsel who so ably argued his case refer us to any particular paragraph which *per se* might be prejudicial to a fair trial, and it was left to the Court to discover or infer in what particular the article could be said to have fairly that bearing or effect. I can find none.

The complainant in his affidavit filed in reply refers generally to conversations and articles in certain newspapers not

before us as the result of the article in the *Globe*, and which satisfied the applicant that his trial had been prejudiced, and if I understood the argument, that in that way the article in question resulted in causing injury to Mr. Wilkinson. That may be so, but I have failed to find any authority that would justify us in interfering in this summary way, and to punish the proprietor of a paper as for a contempt, because other papers or persons have discussed the bearing of an article appearing in his paper. I do not think it sufficient for Mr. Wilkinson, in his affidavit upon which this application was founded, to say that in the publication complained of, the material of the article touches upon at least one of the alleged libels with which he stood charged.

The learned Chief Justice has referred to a paragraph of the article which in his opinion is sufficient to call for our interference. With the utmost deference and respect for so high an opinion I cannot concur in that view. I cannot think that a mere reference to the charges, upon which the criminal information was granted, as libels, or to the applicant having published other libels, looking at the context and the object of the reference, would justify us in granting an attachment as for a constructive contempt. This Court in granting the criminal information necessarily held that the matters published by Mr. Wilkinson respecting Mr. Simpson were libellous, and I cannot see that the paragraphs referred to in the article in question would have a greater influence or prejudicial effect than the written opinions of the Judges. It may be that the references to Mr. Wilkinson amount to a libel on him, but that is not the question now before us. In my opinion to hold that the remarks I refer to amount to a constructive contempt, calling for the extraordinary interference of the Court and the infliction of punishment, would be circumscribing the liberty of the press to an extent I am not prepared to acquiesce in, nor am I prepared to hold that because the publisher of one paper refers to the publisher of another as a libeller under circumstances such as we have

before us, that such a statement should be construed to be a contempt and subjecting the publisher to an attachment.

Independent of these considerations, I am of opinion that Mr. Wilkinson has disentitled himself by his own conduct from invoking the assistance of the Court. We cannot ignore the fact that Mr. Wilkinson is the proprietor of a paper published and circulated in the county where the criminal information is to be tried, and that through its columns, besides negating as already mentioned any prejudicial result from the article in question, comments were made on the judgment of the Court and the article in the *Globe*, defending himself and attacking his opponents—among others Mr. Brown—comments I may remark just as likely to prejudice the case of the private prosecutor, Mr. Simpson, who is equally entitled to the protection of the Court, as the articles now complained of were likely to prejudice the trial of Mr. Wilkinson. Under such circumstances the Courts refuse to exercise their summary powers in aid of a party adopting such a course.

In the case of *Birch v. Walsh*, 10 Ir. Eq. R. 93, an application for an attachment for contempt was made on the 1st December for an article published in the *Tipperary Vindicator* on the 14th November. Two of the grounds relied on in the complainant's affidavit were, that what appeared in the paper wilfully misrepresented the statements and charges made in the plaintiff's bill in Chancery : that the publication was a libel on the plaintiff, and was intended to prevent a fair trial between the parties by creating an unjust prejudice against the plaintiff, holding him up as an object of public odium, &c.; and that the publication was calculated to impede the free course of justice.

The Master of the Rolls, in giving judgment, reviewed all the cases of constructive contempt prior to that period (1846). He referred to a case decided by Lord Hardwicke, who committed the editor of a paper, and after observing that the course pursued of committing for constructive contempt led to much observation, he quoted the



following remarks of Mr. Hardgrave: "If the doctrine of contempts be thus wide; if any of the great Courts of Westminster Hall may construe what they please into contempt, and may under such denomination without trial by jury commit all persons of crime, and also have an indefinite power of punishing by fine and imprisonment; and if all this when done be unappealable and unexaminable, what is there but their own wisdom and moderation, and the danger of abusing so arbitrary a power, to prevent any Court under shelter of the law of contempts from practising all the monstrous tyranny which first disgraced and at length overwhelmed the Star Chamber."

The Master of the Rolls, after referring to other cases of contempts, says, p. 101: "The case therefore comes to this: A libel has been published of the plaintiff pending the pleadings in this cause. The Court has no authority whatever to commit for a libel, unless it is calculated to obstruct the free course of justice. I am not satisfied that it is so calculated. \* \* I think it is much more proper that the plaintiff, if he shall be so advised, should proceed by action, information, or indictment, in which proceedings the party accused would have the benefit of a trial by jury. I shall therefore made no rule on the motion."

Lord Campbell, in his life of Chief Justice Wilmot, referring to Chief Justice Wilmot's undelivered judgment in the case of *Rex v. Almon*, which was cited by the learned Chief Justice in his judgment just delivered, (and which was a summary application for publishing libellous matter severely reflecting on Lord Mansfield and other Judges of the Court, which after cause was shewn was dropped), Lord Campbell said: "Although there can be no doubt as to the power to proceed by attachment in such a case, if a prosecution for a libel on Judges be necessary, the preferable course is, to proceed by information or indictment, so as to avoid placing them in the invidious situation of deciding where they may be supposed to be parties: Lives of the Chief Justices, 2nd vol., 228.

In the case of *Regina v. The Proprietors of the Notting-*

*ham Journal*, 9 Dowl. 1042, it was objected that after the publication complained of, the applicant had published in other papers a libellous attack against the defendant. It was contended there, as here on the part of Mr. Wilkinson, that it was only a strong and indignant denial of the imputations cast on the complainant.

Lord Denman, C. J., who delivered the judgment of the Court, said, p. 1043 : " Persons who ask for the interference of this Court in their favour, by the exercise of its summary jurisdiction, must leave themselves wholly in the hands of the Court. If in any way they make attacks on the parties against whom they ask for our summary interference, they disentitle themselves to succeed in their application. There is no restrictive qualification on this rule, which has been again and again laid down in this Court."

And in the case of *Daw v. Eley*, L. R. 7 Eq. 49, which was a case to commit for a contempt by publishing an article in *The Volunteer Service Gazette*, Lord Romilly, Master of the Rolls, said, p. 61 : " Unquestionably if a person submits to have the matter discussed in the public papers, and enters into the arena of public discussion, he cannot afterwards complain that this has been done ; the Court will say to him, ' as you have thought fit to discuss it there, you have accepted another tribunal '."

I may refer to the case of *Rex v. Peach et al.*, 1 Burr. 548, not citing it out of disrespect to either Mr. Wilkinson or Mr. Brown, but as shewing the principle upon which the Court acts. That was an application for a criminal information, and on cause being shewn, it appeared that the applicants were, as the report says, a parcel of infamous cheats and gamblers, and the defendants of the same profession and character ; and as it appeared clear to the Court that the parties complaining, and those complained of, were all of them alike a parcel of infamous cheats, the Court unanimously refused to give the complainants the extraordinary assistance of the Court to attack their brethren in iniquity, and discharged the rule.

In my judgment, the applicant has failed to make out a

case for our interference on the ground that the article is calculated to prejudice his trial.

I now proceed to the most important point raised by this application: Whether the applicant, failing to sustain his rule for a constructive contempt affecting himself, is now entitled to ask the Court, upon his own suggestion and at his instance, to punish his adversary for a direct contempt of the Court itself by the publication of the article in question—a contempt committed five months before this application—a publication which the Court did not deem worthy of notice, did not think it necessary to call on the publisher to answer for. I have been unable to find any precedent or authority, or even suggestion, for such a proceeding, although this arbitrary power of the Court has existed during many centuries, a power, as Tindal, C. J., said, coeval with the Courts themselves; and Mr. Robinson had to admit, no doubt after the most diligent search, the absence of authority. When we consider the nature of the proposition, I should have been surprised if authority could have been found.

I am certainly not disposed at this day to create a precedent for such a proceeding. On the other hand, I feel, in the interest of the administration of justice, that such an application should be met with a decided refusal. To assent to it would be opening the door to a species of application hitherto unknown—one pregnant with mischievous results, and which would be resorted to, not with the object of upholding the dignity of the Court, but for serving private or political ends, or other purposes quite foreign to such an object.

The Court, in my opinion, is not obliged to take notice of libellous or contemptuous publications directed against the Court itself. I cannot admit the right of any person to initiate or take a proceeding of this nature for a contempt which the Court did not think worthy of notice. This extraordinary power has hitherto been seldom used, and should be rarely put in motion or exercised, and never, in my judgment, except upon the request or at the instance

of the Court. To permit this summary proceeding to be taken at the will of any individual would be placing in his hands, as I have already said, means which, under the pretence of maintaining the dignity of the Court or respect to its authority, might be used to gratify a revengeful spirit.

This is the first occasion the Court has been invoked in a matter of this nature. My duty as a Judge is to administer the law as I find it, but if I am at liberty to express any personal opinion upon the expediency of exercising the power of the Court to summarily punish contempts not committed in its presence, and not calculated to obstruct the course of justice, but by the publication of libellous matter unfairly criticising or impugning the action of the Court or imputing impure or corrupt motives to its members, I would venture to say that in such cases the exercise of this arbitrary power would be a questionable remedy, either for maintaining respect for the Court itself or vindicating the characters of its members. As it is an arbitrary power, and its exercise cannot be questioned, it will always be regarded with jealousy and with great distrust if, unfortunately, the exercise of the power is involved, no matter how remotely, with the struggle of political parties.

As said by Mr. Justice Scott, who dissented from the majority of the Supreme Court of Illinois in giving judgment in the case cited by Mr. Robinson—*People v. Wilson*, 64 Ill. 194, 235—"It is far better that the Judges of the Courts should endure unjust criticism, and even slanderous accusations, than to interpose of their own motion to redress the offence against themselves, when the offence complained of is not committed in their immediate presence."

Respect to Courts cannot be compelled, it is the voluntary tribute of the public to worth, virtue, and intelligence; and while they are found on the judgment seat, so long and no longer, will they retain the public confidence. In that case the Court requested the Attorney-General to move the rule.



Mr. Justice Coleridge, in *Ex parte Wilton*, 1 Dowl. P. C. 805, 806, which was an application to commit for contempt, made the following observations on refusing a rule: "As I did not recollect any case that could be considered in point, I desired to pause before I granted the rule, because, although no Court ought to shrink from the assertion of those privileges, or the exercise of those powers with which the law has invested it in trust for the public, and to enable it better to discharge its duty to the public, yet every Court, however high, ought to proceed with great caution in the use of summary power, and should hesitate in making a precedent which may be abused, even where there may be much seeming reason and convenience in the exercise of it in the particular instance."

In every case I have been able to refer to, I find the greatest reluctance in the Courts taking any step of this kind, and that the power now invoked has only been exercised when it was essential or necessary to prevent justice being obstructed or to protect suitors.

If I had been satisfied that Mr. Wilkinson had made a case entitling him to our interference upon the ground that his trial was prejudiced, the view taken by Sir George Rose in *Ex parte Turner*, 3 M. D. & DeG. 523, at page 556, might then have been applied here. That learned Judge said: "I take the liberty of repeating that this contempt is a compound contempt, in which the part which relates to the Court itself is perhaps the least. It is not for me to say, whether the learned Judge, who has been the subject of Mr. Van Sandau's observations, would have found it necessary to vindicate himself by any process of contempt. That learned Judge has never stirred in the matter at all. But when parties are insulted, as the petitioners in this case have been, and when, upon the whole of the circumstances being brought before the Court, the Court finds itself involved in the same contemptuous language, it is not to vindicate its own particular insult that this process is now put in force, but because the parties before the Court are under its protection, and because it is a contempt.

of the Court to direct insulting language against them during the proceedings."

In that case the publisher of a pamphlet referred to the applicant in a very libellous and abusive manner, and charged the Chief Judge with co-operating, &c., with the applicant, and taxing officers of the Court, &c., Sir George Rose designating it as gross and scandalous.

Mr. Robinson, during his able argument, said he preferred to some extent referring to American cases, because it was thought by some that the limits of discussion are wider and freer there than in England or this country, which he considered a mistake. But I find in 1 *Kent Com.* 11th ed., 321 note, that while the United States Judiciary Act of 1789, gave to the Courts the common law power to punish all contempts of authority by fine or imprisonment at their discretion, that in 1831 an Act of Congress was passed defining such powers, at the same time prohibiting all interference by attachment and summary punishments for contempts committed out of the presence of the Courts of the United States, by libels upon the Court and the parties and pending causes; and the provisions of this Act of Congress has been adopted in several of the States of the Union with respect to their own Courts.

I think it necessary briefly to refer to one other point. It is said that as the libellous article is now before us, as it contains a scandalous attack upon the Court, and although so long a period has elapsed since its publication, we should at this late day, because it is forced upon our attention by Mr. Wilkinson in considering his personal complaint, that upon his motion or at his instance we ought now to exercise the summary power placed in our hands and punish the author for the contempt against the Court itself.

The learned Chief Justice is of opinion that we cannot well avoid taking that course. With the very utmost respect, considering all the circumstances under which this application is before us, I do not think it is either necessary or incumbent on us so to do. It is purely a matter of discretion, and in my judgment, in the exercise

of a sound discretion, after we have abstained from noticing the libellous matter for five months, we ought not now, as it were, to be coerced to take a proceeding which we would not have taken otherwise; but rather decline to exercise that power, or sanction such a precedent as our doing so would establish. In adopting such a course I do not think that the dignity of the Court will suffer, or that respect which is due to its authority will be impaired.

And I may further add that in my opinion it is quite unnecessary to take any such proceeding to vindicate the high and very well known character of my brother Wilson.

On the whole I think the rule should be discharged.

WILSON, J., was not present at the argument, and took no part in the judgment; and the Court being equally divided, the rule dropped.

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## MCGREGOR V. MCMICHAEL ET AL.

*Survey—Patent issued before—Subsequent survey—Double-fronted concessions*

The plaintiff claimed a piece of land as part of lot ten in the first concession west of the Communication road in the township of Harwich; the defendants claimed it as part of lot nine; and the plaintiff was entitled to recover if the line between the lots was to be run as in the case of a double not a single-fronted concession. It appeared that lots nine and ten were described for patent by metes and bounds in 1793, and letters patent were soon after issued in accordance with this description. The original survey of that part of the township was not completed on the ground, but the surveyor laid out the Communication road as directed and returned a plan shewing it, and, as the learned Judge who tried the case without a jury found, he gave the information upon which the description for these lots and for others about the same time were prepared. The principle of survey with double-fronts was not in use before 1820. In 1821 another surveyor was instructed by the government to complete the survey of this township with double-fronted concessions, and to explore and survey the road, but not to interfere with the lands ceded intersecting it. No posts on the ground were found along the communication road, and he laid out the lots along it as double fronted.

*Held*, that the latter survey, made after the patents for these lots, could not affect them: that the principle of survey with double-fronts could not be applied to the grant made long before it was adopted; and that the plaintiff, therefore, could not succeed.

EJECTMENT for a piece of land described as being part of lot 10, in the first concession west of the Communication road, in the township of Harwich.

The piece was in the writ particularly described as follows:—"Beginning at the front between lots 9 and 10, on the east side of the road between the 1st and 2nd concessions west of the Communication road, in Harwich; thence north  $59^{\circ} 28'$  west 1 chain 72 links; thence north  $30^{\circ} 32'$  east 34 chains, more or less, to the centre of the said 1st concession; thence south  $59^{\circ} 28'$  east 1 chain 72 links; thence south  $30^{\circ} 32'$  west 34 chains, more or less, to the place of beginning."

This piece of land, although claimed by the plaintiff as being a portion of lot 10, was claimed by the defendants as being a portion of lot 9 in the 1st concession west of the Communication road, in the township of Harwich.

The question for trial was to which lot the piece of land belonged.



If the line between the lots were to be run from the front angle of lot 9 as in the case of a single fronted concession, it was conceded the defendants were in possession of their own land, but if run as in the case of a double fronted concession, then the plaintiff was entitled to a verdict.

Instructions were on 14th November, 1795, sent from the surveyor-general's department to Mr. Abraham Iredell, a deputy surveyor then living in Detroit, to survey and lay out into lots a considerable portion of land in the western part of the province, including what is now known as the township of Harwich.

The following is an extract from the instructions:—"A road must be run as straight as possible between Chatham and the Point aux Pins (on Lake Erie), to be hereafter called Land Guard, where a situation for a town is to be reserved by you. On each side of this road 200 acre lots, from the reserve at Land Guard to the surveys near Chatham, the usual reserves are to be made on this communication which is to be granted in single lots only to *bonâ fide* settlers."

Iredell laid out the communication road as directed, and returned a plan shewing it. He laid out three concessions near the river, but no traces of his survey could be found on the ground near the lots in question.

The evidence as to what Iredell was asked to do, and what he did in Harwich, is more full in *Fields v. Miller*, 27 U. C. R. 416, 421, than in this case. What he did in Howard will be seen on reference to *Smith v. Clunas et al.*, 20 C. P. 213.

Lots 9 and 10 on the west side of the Communication road, being the lots in question, were described for patent as follows:—"Commencing in front of the said 1st concession on the west side of the said Communication road, at the north-east angle of lot No. 8; then south 30° 55', west 67 chains 40 links; then north 58° 5' west 57 chains 60 links; then north 31° 55' east 135 chains 80 links; then south 58° 5' east 57 chains 50 links; and then south 31°

55' west 68 chains 40 links to the place of beginning, with allowances for roads."

The description referred to an order in council dated 11th July, 1793. No copy of the order in council was produced in evidence. The letters patent were shortly afterwards issued for these lots in accordance with this description. They were dated May 17, 1802.

Descriptions of a like kind, of lots 6, 7, 8, 11, and 12, on the east side, and lots 5, 6, 7, 11, and 12, on the west side of Communication road in the same township, referring to orders in council dated in the years 1796 and 1798 were tendered in evidence, but rejected by the learned Judge, on the ground that it did not appear that the Crown had ever acted on them by granting letters patent in accordance therewith.

The principle of surveying lands with double fronts was not, according to the evidence, in use before 1820.

On the 17th of April, 1821, instructions were sent from the Surveyor-General's office to Mahon Burwell, a deputy surveyor, for the completion of the survey in the townships of Howard, Harwich, Raleigh, Tilbury East, Tilbury West, Romney, Mersea, Gosfield, Colchester, Rochester, Maidstone, and Sandwich.

He was directed to explore and survey a line for a road in as direct a course as the nature of the ground would allow, with a range of 100 acre farm lots on each side thereof according to "the new principle of survey"—that is, with double-fronted concessions—from Talbot Road near Point Pelé to Sandwich, but "not interfering with the lands ceded where any may happen to intersect the said line of road."

He was told that his first object would be to ascertain by original marks or vestiges of the first surveys on the ground the surrounding or outlines of the several townships.

Accompanying these instructions, but not produced at the trial, was a list of all the lands under grant or location, the concessions and lots and the Crown and clergy reserves,

together with a memorandum of such references as to curves and distances as would enable the surveyor to complete what remained unsurveyed in the several townships, "without interfering with any of the original surveys, so far as the same may have been made therein, and the lands conceded."

The survey of what was at the time supposed to be the unsurveyed portion of the township of Harwich, was made in 1823, by a Mr. Smith, under Mr. Burwell. George Munro, who was field note keeper and assisted Smith in the survey, was examined as a witness at this trial.

Munro swore that the only traces of Iredell's survey were near the river—not near the lands in question in this suit: that Smith surveyed with double-fronted concessions: that the numbers of the lots were marked on the side lines by the usual posts and a picket placed in the centre of the road, 50 links from each post on either side of the concession: that he never found any trace of a previous survey in the township except as already mentioned: that Communication Road was then a mere sleigh track, and that there was no settler between lot 27 on the Communication Road and the lake, and no one south of Iredell's survey in Harwich except a Mr. Wedge: that there were no posts on Communication Road, but blazes were found on each side of the road by Little Lake, now called Rond Eau. He swore that they ran their survey from what at the time was supposed to be Iredell's survey to the Rond Eau marsh.

There was evidence on the part of the plaintiff of the grant of half lots along the Communication Road as in the case of a double-front survey.

The learned Judge was satisfied on the evidence that the concessions in this part of Harwich were intended by Burwell's survey to be laid out as double-fronted concessions, and were in fact so laid out. He regarded Burwell's survey as the only original completed survey of that part of Harwich. But it was, he said, manifest to him that Iredell had been over the ground and had located the

general line of the Communication Road, and furnished the information upon which the descriptions for the lots in question and others about that time were prepared.

The learned Judge, being of this opinion, held that Burwell's survey could not affect the defendants' land, which was granted by a description applicable to a lot in a single-fronted concession.

The learned Judge thereupon rendered a verdict for the defendants.

During Michaelmas term last, December 6, 1876, *C. Robinson*, Q. C., obtained a rule calling on the defendants to shew cause why the verdict should not be set aside, and a verdict entered for the plaintiff, pursuant to the Law Reform Amendment Act, on the ground that the concession in which both plaintiff's and defendants' land is situate was shewn to be a double-fronted concession.

During this term, February 15, 1877, *C. R. Atkinson* shewed cause. He cited *Archer v. Kilton*, 24 C. P. 196; *Stock v. Ward et al.*, 7 C. P. 127; *Manary v. Dash*, 23 U. C. R. 580; *McDonald v. McDonald*, 2 U. C. R. 267; *Murphy v. Healey*, 30 U. C. R. 192; *Smith v. Clunas*, 20 C. P. 213; *Martin v. Crow*, 22 U. C. R. 491; *Keeley v. Harrigan*, 3 C. P. 189; *McEachern v. Somerville*, 37 U. C. R. 609, 620.

*Robinson*, Q. C., (*Scane* with him,) contra, cited *Marrs v. Davidson*, 26 U. C. R. 641; Consol. Stat. U. C. ch. 93, sec. 31; *R. & J. Dig.*, p. 1022; *Jamieson v. McCollum*, 18 U. C. R. 445; *Doe d. Smith v. Galloway*, 5 B. & Ad. 43, 51; *Wigle v. Stewart*, 28 U. C. R. 427; *Iler v. Nolan*, 21 U. C. R. 309; *Fields v. Winter*, 27 U. C. R. 416; *Holmes v. McKechin et al.*, 23 U. C. R. 52, 351.

March 10, 1877. HARRISON, C. J.—The only question for our decision is, whether the piece of land in dispute is a part of lot 9 or of lot 10 on the west side of the Communication road in the township of Harwich.



The question is one which, according to the opinions of the majority of the Judges in the former Court of Appeal, may be determined in an action of ejectment: *Sexton v. Paxton*, 9 U. C. L. J. 207; and following that case as law, appears to us to have been properly raised between the parties in this action: *Archer v. Kilton*, 24 C. P. 195.

The determination of the question must rest on the point, whether the boundary line between the lots 9 and 10 is to be run on the principle of a double-fronted concession.

It is argued for the plaintiff that the only survey of the portion of Harwich, in which the land in question is situate, was in 1822 by Burwell: that he surveyed for double-fronts: that his survey was adopted by the Crown, and that there is no satisfactory evidence of any other survey in that part of the township.

It is argued for the defendants that the grant for the two lots in question was made long before 1822, and long before the principle of double-fronts was applied in surveys: that the land so granted is described as being particular lots in a particular concession west of the Communication road, with allowances for roads: that the lots are numbered consecutively: that the distances and courses of the several boundaries are also given: that these are given on the principle of a single-front concession: that no such description could have been given without a previous survey of some kind; and that there is evidence of a previous survey, more or less extended in Harwich by Iredell, although none of his work can be traced on the ground.

The existence of a completed survey previous to a grant from the Crown, although convenient, and for that reason usual, is not essential to the validity of the grant. No one disputes the power of the Crown to grant land before any survey is made, and so long as the land described in the grant can be found on the ground the grant must be operative. See *Iler v. Nolan*, 21 U. C. R. 309; *Fields v. Miller*, 27 U. C. R. 416; *McEachern v. Somerville*, 37 U. C. R. 609, 620.

Where a grant of lots is made before a survey or completed survey, the situation and boundary lines of the land granted on the ground must be ascertained as they were ascertainable before the passing of any survey Act, that is by the courses and distances expressed in the grant, and where there are original plans, instructions, field notes, diaries, or descriptions for patent, these may be referred to for the purpose of aiding the grant. See *Doe d. Strong v. Jones*, 7 U. C. R. 385; *Keeley v. Harrigan*, 3 C. P. 197, 201; *Smith v. Clunas et al.*, 20 C. P. 213; *Juson et al v. Reynolds*, 34 U. C. R. 174; *McEachern v. Somerville*, 37 U. C. R. 621.

If the grant describe the land granted as numbered lots in a given concession of land, and these lots are particularly described by metes and bounds, the inference that there was a previous survey of some kind—a survey more or less completed—is irresistible. See *Martin v. Crow*, 22 U. C. R. 485, 498; *Wigle v. Stewart*, 28 U. C. R. 427, 433.

If the grant describe the land as single-fronted, the inference that the prior survey was not on the double-fronted principle is also irresistible.

Now, where a grant is made on one principle of survey, and that grant is operative on that principle, no subsequent survey on a different principle can in any manner affect the prior grant. See *Doe Talbot v. Peterson*, 3 U. C. R. 431; *Keeley v. Harrigan*, 3 C. P. 197; *Stock v. Ward et al.*, 7 C. P. 127, 130; *Murphy v. Healey*, 30 U. C. R. 192.

The early surveys in this province were in single-fronted concessions. The description contained in the grant of the lots in question indicates that there was a single-fronted survey of some kind before the issue of the grant. That must have been Iredell's. It does not appear from the description that any posts were planted on that survey to mark lots on either side of the Communication road. It is not therefore surprising that no such post were ever afterwards seen. But the Communication road was seen. It was in part blazed. It was laid out on a plan returned by Iredell to the Crown. The Crown, by the subsequent issue

of letters patent, adopted it as a basis of survey, and so recognized the survey more or less complete which Iredell then made. Lots were granted both east and west of Communication road long before Burwell's survey was thought of. These lots as described were of a given width and a given depth having surveyors courses. The starting point in each case is on one side or other of the Communication road. The starting point of Iredell's survey, according to his field notes, appears to have been a natural object—a pine tree described at Point aux Pins. Measuring the width of each lot along the line of the road from the side from which the lots were numbered, there could be no great difficulty in ascertaining the point of commencement for any particular lot.

Whether Iredell did work on the ground or not where these lots are situated, it is clear that the principle of his survey was adopted by the Crown when granting these lots, and that the grant in question is utterly opposed to the double-fronted principle.

It is proved that the principle of double-fronts—that is, with posts or monuments on both sides of the allowance for roads between the concessions and the land described in half lots—was not adopted by the Crown before 1820. See *Warnock v. Cowan*, 13 U. C. R. 257; *Holmes v. McKechin*, 23 U. C. R. 52, 321; *Marrs v. Davidson*, 26 U. C. R. 641; *Taylor v. Verulam*, 21 C. P. 154.

We therefore agree with the learned Judge in holding that this principle cannot be applied to the grant made many years before it was either known or practised. The grant does not on the face appear to be subject to any survey to be thereafter made. It is based on a survey before then made. Some such survey was made. Besides the plaintiff is seeking to disturb defendants' possession. It is for the plaintiff to shew that the survey made in 1822 governs the grant made twenty years before it. He has not done so. Whether the survey under which defendants claim be satisfactorily shewn or not the plaintiff, under the circumstances, must fail: *Doe d. Strong v. Jones*, 7 U.

C. R. 385. The case is not unlike *Murphy v. Healey*, 30 U. C. R. 192.

In our opinion the rule *nisi* must be discharged.

MORRISON, J., concurred.

WILSON, J., was not present at the argument, and took no part in the judgment.

*Rule discharged.*

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WILDS ET AL. V. SMITH.

*Sale of goods—Non-acceptance—Stoppage in transitu.*

The plaintiffs, merchants in New York, on the 4th January, 1876, sold to E. B. & Co., merchants in Toronto, 50 bags of Jamaica coffee, and shipped it by rail to Toronto, where E. B. & Co. received it, paid the freight, and placed it in a bonded warehouse. They paid the duty on and sold 23 bags, 15 before and 8 after the objection for damage hereinafter mentioned; and on the 7th February made an assignment in insolvency to the defendant, a notice of stoppage in *transitu* having been served on the Collector of Customs on the 2nd February. *Held*, following *Graham v. Smith*, 27 C. P. 1, that if the coffee had been accepted so as to become the property of E. B. & Co., the *transitus* would have been at an end.

On the 17th January, E. B. & Co. wrote to their buyer in New York, stating that with the exception of 15 bags the coffee was all badly stained with some chemical substance, rendering it unmerchantable, and asking what they should do, as they could not use it. The buyer answered on the 20th that he could not understand how the coffee became so, that it must have been damaged on the way to Toronto, but that he would try and get for them a reduction in price. To which on the 24th, E. B. & Co. replied that there was not the least doubt but that the damage was an old one, of which the sellers could satisfy themselves by examining the goods: that they would call in a coffee roaster to inspect the lot, and if anything could be done they would communicate with him without delay:

*Held*, by GALT, J., and affirmed by this Court, that there had been no acceptance of the coffee complained of as being damaged, and that the plaintiffs were entitled to recover the same against the defendant, the assignee of E. B. & Co.

SPECIAL CASE, stated by consent and by order of Robert G. Dalton, Esquire, dated 26th May, 1876, according to the Common Law Procedure Act.

1. The plaintiffs, merchants in New York, on the 4th January, 1876, sold to E. Bendelari & Co., merchants in Toronto, fifty bags of Jamaica coffee at 60 days credit, at nineteen cents per pound, and the coffee so purchased was shipped by rail to Toronto from New York at the risk of E. Bendelari & Co. who on the arrival of the said coffee at Toronto, on the 12th January last, paid the freight thereon.



2. On the arrival of the coffee it was bonded in a portion of the warehouse of E. Bendelari & Co., which was partitioned off, and called by the customs authorities as "Her Majesty's bonded Warehouse No. 4."

3. Subsequent to the said arrival, and before the insolvency hereafter referred to, the said E. Bendelari & Co. sold 15 bags of the said coffee, paid the customs' duties thereon, and delivered them to the purchaser, and after the objections for damage done to the rest of the coffee, in the correspondence hereafter mentioned, and before insolvency, sold 8 bags thereof to a purchaser.

4. A notice of stoppage in transitu was served on the collector of customs at Toronto on the 2nd February last.

5. On the 8th and 9th March last two other notices were served on the collector, and a tender of the duties payable in respect of the said coffee was made, and an offer was made to him of full indemnification against the consequences of the delivery of the same to the plaintiffs.

6. The collector refused to deliver the said goods, on the ground that they had been claimed by the defendant as assignee of E. Bendelari & Co.

7. On the 7th February last E. Bendelari & Co., pursuant to a demand of creditors, made an assignment under the Insolvent Act to the defendant, who accepted, and is the duly appointed assignee of the said E. Bendelari & Co.

The questions for the opinion of the Court are:—

1. Whether, under the circumstances and facts stated, the plaintiffs are entitled, as against the defendant, to a delivery to them of the said 27 bags of coffee as having been duly stopped in transitu?

2. Whether upon the facts disclosed in the correspondence hereto annexed the plaintiffs are entitled, as against the defendant, to the 35 bags of coffee complained of as being damaged?

If the Court should be of opinion in the affirmative of the first of said questions, then judgment shall be entered for the plaintiffs for \$999 and interest from 1st April last.

And if the Court should be of opinion in the affirmative of the second of said questions, then judgment shall be entered for the plaintiffs for \$1,295.06 and interest from the 1st April last.

If both of said questions be answered affirmatively, as aforesaid, judgment shall be entered for the plaintiffs for the costs of this suit.

If one of said questions be answered affirmatively, and the other negatively, then the costs shall be apportioned.

If the Court shall be of opinion in the negative of both of said questions, then judgment of *nolle prosequi*, with costs of suit, shall be entered for the defendant.

A good deal of correspondence passed between E. Bendelari & Co. and their New York buyer as to damage done to the coffee, either before leaving New York or in transit. The material letters were as follow:—

Toronto, January 17th, 1876.

"MESSRS. JOHN W. O'SHAUGHNESSY & Co.,

81 Beaver Street, New York.

DEAR SIR:—The fifty bags Jamaica coffee have arrived, and we regret to say that with the exception of 15 bags they are all badly stained with some chemical substance, causing a very strong smell, and rendering the coffee entirely unmerchantable. We send you by this mail a small sample with a piece of the bag shewing the nature of the stain. Please see the sellers, and let us know what to do, as we cannot use it.

Yours truly

E. BENDELARI & Co."

New York, January 20th, 1876.

"MESSRS. BENDELARI & Co.,

Toronto.

GENTLEMEN:—Your favor of the 17th inst. to hand and noted. In reference to the damages on the 35 bags Jamaica coffee we can't understand how it became so. \* \* \* However on receipt of this letter telegraph us if you can use the coffee at half cent per pound allowance on the 35 bags, although the parties decline to have anything to do with it, as they say they were not aware of anything being the matter with the goods; and as we passed and examined every bag it must have got damaged while on the way to Toronto. We have no doubt but what you can use the goods at half cent per pound allowance, which we will try and get you, but you must not let on that the proposition came from us.

Yours truly

JOHN W. O'SHAUGHNESSY & Co."

Toronto, January 24th, 1876.

"MESSRS. JOHN W. O'SHAUGHNESSY & Co.,

81 Beaver Street, New York.

DEAR SIRS:—We are in receipt of your favour of the 20th inst., and note contents. We wired you to-day as follows: 'Yours received. See our letter of to-day about coffee,' which we now confirm. We are surprised to hear that your friends were not aware of the damage to the coffee, and that they think it must have occurred between New York and Toronto. There is not the least doubt but that the damage is an old one, and this they can satisfy themselves about by examining the goods.

We will call in a coffee roaster to inspect the lot, and if anything can be done we will communicate with you without delay.

Yours truly

E. BENDELARI & Co."

May 30th, 1876. *O'Donohoe* for the plaintiff.

*Foster and Clarke*, for the defendant.

The argument was the same as on the rehearing, post p. 141.

June 26, 1876, GALT, J.—This is a special case arising out of the insolvency of Bendelari & Co., as stated in the cases of *Graham et al. v. Smith*, 27 C. P. 1, and *Wiley et al. v. Smith*, and the circumstances as regards stoppage *in transitu* are the same as in those cases, but this must be decided on a different principle.

(Here his lordship stated the facts.)

I have already decided in the cases of *Graham et al. v. Smith*, and *Wiley et al. v. Smith*, which are in their circumstances similar to the present, that the right of stoppage *in transitu* was at an end, and if the right of the plaintiff depended on that, I should hold that they were barred..

There is, however, another question which must be decided, viz.: whether the insolvents ever accepted the coffee in dispute so as to make it their property.

I attach no importance to the *transitus* being at an end, for *Smith v. Hudson*, 6 B. & S. 431, and *Nicholson v. Bower*, 1 E. & E. 172, shew that the fact of the *transitus* being finished does not by any means decide the question. In both these cases it was held that the *transitus* was at an end, yet in both the Court held that the defendant, the original vendor, was entitled to the property in dispute.

All the cases to which I have been able to refer, as regards acceptance and receipt of goods, arose under the Statute of Frauds, but it appears to me that the same principle must apply in every instance. It is plain from them all that there may be an actual receipt without any acceptance, so as to comply with the provisions of the 17th section. It is true that no question as to the fact of the sale—I mean as regards the statute—arises here, for the agreement was in writing, and a portion of the coffee actually accepted, viz., that portion which was sold by the insolvent: but the point to be decided is, did the insolvent accept the damaged coffee so as to vest the property in them; they had, no doubt received it, but had they accepted it?

The case of *Nicholson v. Bower* was as to the right of the defendant to stop the delivery of a quantity of wheat which had been sold by him to the bankrupt, and which had been sent to the latter by railway, and was lying at the railway station consigned to him. It is usual in the corn trade, when corn is warehoused, for the consignee, before finally accepting it, to take a sample from the bulk as delivered at the warehouse, and compare it with the sample by which it was purchased. On Friday, 8th May, the bankrupts sent their carman to the station for a bulk sample of the wheat, which he brought back. On the morning of the 9th May G. P., one of the bankrupts, examined it and said, "Do not work it at present"—"to work" being explained at the trial to mean, to cart it home.—On the same day P. & Co. being in embarrassed circumstances,

decided upon calling a meeting of their creditors.. The defendant in consequence came to P. & Co. on that day and asked for an order for the wheat, which they were about to give when some of the other creditors present interfered. The defendant afterwards stopped the wheat. The defendant's witnesses stated, which G. P. denied, that G. P. had told the defendant on Monday, 11th May, that he had refused the wheat on 9th May, because it was not equal to the sample. It was admitted that the wheat was actually equal to the sample. The jury, in answer to a question of the learned Judge found that G. P. had told the defendant that he had refused the wheat because it was not according to sample, but that it was not really refused by him on that ground.

Lord Campbell, C. J., in giving judgment says, p. 177 : "Mr. Bovill has argued very powerfully that the *transitus* was at an end ; and if I were to give judgment on that point, I should be disposed to take the same view. But it is not necessary for me to decide that question ; because I am of opinion that there was no binding contract between the vendor and vendee, without an acceptance by the latter."

Hill, J., also says, p. 179 : "The question of acceptance or non-acceptance, in a case like this, depends upon the intention of the vendee, as gathered from his outward acts. The taking of a part of the goods may amount to an acceptance ; but it may be, and I think that in the present case it is, coupled with conduct which rebuts that presumption."

The above case was decided under the Statute of Frauds, but the question of acceptance or non-acceptance so as to pass property in goods must be the same whether the receipt has been under a verbal or a written contract.

On the arrival of the coffee, or as soon after as he had an opportunity of doing so, the insolvent examined the coffee, and wrote to the vendors as has been already mentioned. This was a positive refusal to accept, the words are "See the sellers and let us know what to do, as we cannot use it." The agents of the vendors then wrote, proposing a reduction of price, but this had not been assented to by the in-



solvent before the assignment; on the contrary, he writes: "There is not the least doubt but the damage is an old one, and this they can satisfy themselves about by examining the goods. We will call in a coffee roaster to inspect the lot, and if anything can be done we will communicate with you without delay."

It appears to me that this was a positive refusal to accept, and that the property remained at the risk of the vendors. It is true that upon receiving the insolvent's first letter the vendors might have insisted on B. & Co. either accepting the whole or rejecting the whole. B. & Co. had no power to say, we will accept part and reject the remainder. But the vendors did not act in that way, or assert that right; on the contrary, they were perfectly willing that B. & Co. should retain under the contract the coffee that was sound, and were in treaty for a reduction of the price on the coffee now in question. In my opinion, therefore, the second question should be answered in the affirmative, as I think the plaintiffs are entitled to the damaged coffee.

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From this judgment the defendant appealed.

The case was argued in Michaelmas term, November 24, 1877. *Foster, Clarke* with him, for the defendant. [The argument as to the right of stoppage *in transitu* was the same as in *Graham v. Smith*, 27 C.P. 1.] There was here an actual acceptance, and the insolvents exercised acts of ownership over the coffee. Besides the plaintiffs refused to take the coffee back. He cited *Siffken v. Wray*, 6 East 371; *Mills v. Ball*, 2 B. & P. 457; *Wood v. Jones*, 7 D. & R. 126; *Bird v. Brown*, 4 Ex. 786.

*O'Donohoe*, contra. The insolvents positively in their letters refused to take the coffee, and there was therefore no acceptance. He cited *Elliott v. Thomas*, 3 M. & W. 170; *Curtis v. Pugh*, 10 Q. B. 111; *Jones v. Bowden*, 4 Taunt. 847; *Addison* on Contracts, 7th ed., 448, 451.

The case stood over waiting the judgment of the Court of Appeal, in the case of *Wiley v. Smith*, 1 App. R. 179.

March 10, 1877. MORRISON, J.—The plaintiffs seek to recover in this case—1st. The value of a quantity of coffee consigned by the plaintiffs at New York to the insolvent at Toronto, under the circumstances mentioned in the special case, upon the grounds, first, that the coffee had been duly stopped by them *in transitu*; and, secondly, that as to 35 bags of the coffee they were entitled to recover, as the 35 bags did not pass to the defendant as assignee, as the insolvent, previous to his insolvency, had not accepted these 35 bags.

As to the first point raised, the recent decision in the Court of Appeal, in *Wiley v. Smith*, 1 App. R. 179, is an authority against the plaintiffs' right to stop the coffee *in transitu*, as the facts in this case come within the principle laid down by Mr. Justice Burton in giving judgment in the case in Appeal. For after the coffee now in question arrived in Toronto from New York, it was placed in the bonded warehouse of the insolvent, and he entered into the usual bonds for the payment of the duties, &c.

While I am bound to recognize the principle upon which the Court of Appeal acted, I regret that the Court did not see its way to protect the unpaid vendor, for although the goods in one sense arrived at their destination, the insolvent never had actual or as I think constructive possession of the goods, and could not have put his hand on them until the duties were paid.

With due deference, it seems to me that the vendee had no better possession of the goods than in the case where the carrier retains possession until the freight is paid. It is true that the carrier may assent to the vendee having actual or constructive possession without payment of the freight, but that cannot happen as respects the customs lien, for to entitle the vendee to possession he must enter the goods and pay the duties.

Mr. Justice Galt held that the *transitus* was at an end, and his opinion is upheld by the Court of Appeal.

The other question for our decision is, whether the 35 bags of the coffee in question were accepted by the insolvent. The learned Judge held, and I think correctly, that the insolvent after the coffee arrived in Toronto, and as soon as he had an opportunity of doing so, examined it and found that 35 bags were unmerchantable and unfit for use, and so notified the plaintiffs and refused to accept the coffee, and that it remained at the risk of the owners, the plaintiffs.

On the 20th January the plaintiffs wrote, offering, if the insolvent could use the coffee, a reduction in price. On the 24th the insolvent wrote reiterating the damaged state of the coffee, and that the coffee could not have been damaged on its way from New York, and stated that they would call in a coffee roaster to inspect it, and if anything could be done they would communicate with the plaintiffs.

Nothing further appears to have been done, as the vendees called a meeting of their creditors on the 31st January, and shortly afterwards made an assignment under the Insolvent Act.

The question now is, whether the insolvents having the goods in their power accepted those 35 bags of the coffee, or whether they refused to accept them as not being in accordance with the offer of the plaintiffs, and their acceptance of it. It is true that the insolvents received the goods in bond, and had them placed in the bonded warehouse,—*i. e.*, the coffee consigned to them, assuming it to be such as they had contracted for; but on examination they discovered it to be unmerchantable and unfit for use, and at once repudiated acceptance of the 35 bags.

Upon so declining to accept the coffee the plaintiffs offered the coffee at a reduced price if the vendees could use it. No new arrangement was entered into, the vendees becoming insolvent a few days after. Under those circumstances the damaged coffee remained in the custom house, and so far as the vendees were concerned at the risk of the plaintiffs. It therefore seems to me, as the vendees had repudiated and refused to accept the coffee, the plaintiffs were entitled to resume possession of it.

In addition to the cases cited by Mr. Justice Galt, in his judgment, I may refer to the case of *Bolton v. The Lancashire and Yorkshire R. W. Co.*, L. R. 1 C. P. 431, as having a bearing on this case. There W. sold a quantity of goods to P., which were sent to P., who received a part and declined to take any more. They were, however, delivered at the station for P., and held by the defendants, the railway company, and remained there until P.'s bankruptcy, when W. claimed them. A special case being stated in trover by P.'s assignee against the railway company, the Court held that the plaintiff could not recover.

Erle, C. J., in the course of his judgment, at page 437, said : " Before they arrived there (at the station,) notice had been given by Parsons to the vendor that he declined to receive them ; and after their arrival Parsons gave the defendants orders to take them back again. The vendor at first refused to have anything to do with them ; and thus the goods, being rejected both by the vendor and by Parsons, remained in the hands of the defendants. Under these circumstances it seems to me that the goods never ceased to be *in transitu*. It is clear from the case of *James v. Griffin*, 2 M. & W. 623, that the intention of the vendee to take possession is a material fact. So in *Whitehead v. Anderson*, 9 M. & W. 529, Parke B., says : ' The question is *quo animo* the act is done.' "

Again, " Parsons contended throughout that the goods were so bad that he was not bound to take them. In this state of things the unpaid vendor puts his hand upon them. I am of opinion that is a sufficient defence to the claim set up by the assignee." *Ib.*

And Willes, J., said, at page 439 : " The right to stop *in transitu* upon bankruptcy of the buyer remains, even when the credit has not expired, until the goods have reached the hands of the vendee, or of one who is his agent, as a warehouseman, or a packer, or a shipping agent, to give them a new destination. Until one of these events has happened, the vendor has a right to stop the goods *in transitu*. It must be observed that there is, besides the



propositions I have stated, and which are quite familiar, one other proposition which follows as deducible from these, viz., that the arrival which is to divest the vendor's right of stoppage *in transitu* must be such as that the buyer has taken actual or constructive possession of the goods ; and that cannot be so long as he repudiates them."

The learned Judge refers to the operation of a delivery of a portion of the goods, and says, p. 440: "That doctrine has since been called in question and dissented from ; and it is now held that the delivery of part operates as a constructive delivery of the whole only where the delivery of part takes place in the course of the delivery of the whole, and the taking possession by the buyer of that part is the acceptance of constructive possession of the whole."

In the present case I do not think that the arrival of the coffee at the customs bonded warehouse was *per se* a binding acceptance by the vendees. We have to bear in mind that the contract or purchase of the coffee was made by telegrams, between New York where the plaintiff had the coffee and Toronto where the vendees lived, and the latter had no opportunity of seeing the coffee until its arrival in Toronto, and the vendees had a right to examine the coffee and see if it was of the character and quality they contracted for.

As said by Alderson, B., in *Hunt v. Hecht*, 8 Ex., at p. 817: "He cannot be said to accept that which he knows nothing of, otherwise it would make him the acceptor of whatever the vendor chose to send him ; whereas he has a right to see whether, in his judgment, the goods sent correspond with the order."

And as said by Bovill, C. J., in *Herlbat v. Hickson*, L. R. 7 C. P., at pp. 450, 451: "In cases where, under an executory contract, goods are sent by the vendor which do not come within the general description of those contracted for, the purchaser may refuse to receive, or may reject them. Where there is a warranty of quality, the purchaser is not only not bound to receive the goods unless they correspond with the warranty, but even after they have been delivered by the vendor, may reject them on discovering the defect."

The coffee sold and purchased by the vendees was to be good, ordinary Jamaica coffee, and if upon examination the coffee sent turned out to be Cuba coffee the vendees were not bound to accept such coffee; equally so if the coffee was saturated with some chemical that rendered it unfit for use. Upon examining it it appears they found it to be so, and repudiated acceptance of the thirty-five bags, and if the vendees had not become insolvent, it is quite evident that they would have resisted taking possession of the coffee.

I think the appeal should be dismissed.

HARRISON, C. J.—By the law of England when once the goods have actually reached their destination, and been received by the vendee as his own, there is an end of the right of stoppage *in transitu*.

The Court of Appeal has reversed *Howell v. Allport*, 12 C. P. 375, and held that if the goods have been warehoused for duty by the consignee, the *transitus* is as much at an end as if the consignee had received them into his actual possession.

But in all cases of the kind there must appear to have been at the time of the alleged receipt of the goods by the consignees, at least a willingness to accept. In no case where the consignee has refused to accept has it been, so far as I am aware, held that the *transitus* was at an end. It must, I think, be held that the goods are *in transitu* so long as the consignee for any good cause honestly refuses to receive them.

In *Mason v. Redpath*, 39 U. C. R. 157, I reviewed the cases where the refusal to accept was on the ground that it would, in the altered condition of the consignee, be dishonest for him to accept, and so he refused to accept. I there said: "The cases, although varying in their facts, shew in principle that whether the vendee has accepted goods or not, as and for himself, is a question of fact, and that if on the facts there cannot be said to be an actual acceptance of the goods by the vendee as and for himself, and there be the vendor's assent to the refusal to accept, the goods do

not pass under a subsequent commission in bankruptcy." The cases there referred to were cases of actual rescission of the contract.

In this case there was the refusal to accept by the vendee, but it is not clear that there was an actual assent by the consignors before [the bankruptcy took place. After the refusal, and while the parties were in negotiation for a new bargain, but before the new bargain was completed, the bankruptcy took place.

What are the facts? The consignees supposing the fifty bags were according to contract entered all for duty and sold a portion. But they soon afterwards discovered that the whole lot, with the exception of fifteen bags, were badly stained with some chemical substance, causing a very strong smell, and rendering the coffee, which they had bought as merchandise, quite unmerchantable. In the letter of 17th January, 1876, the consignees informing the consignors of the state of the coffee say, "We cannot use it." On the 20th of the same month the consignors wrote asking the consignees to use the coffee "at half a cent per pound allowance on the 35 bags." On the 24th of the same month the consignees write to say they will call in a coffee roaster to inspect the coffee, "and if anything can be done" they will communicate without delay. Bankruptcy followed before anything further was done. If necessary to find not only that there was a refusal by the consignees to accept the goods under the only contract which had been made in respect to them, but an assent on the part of the consignors, I think we might infer the assent.

But whether or not, I am of opinion that where the vendee in good faith refuses to accept on the ground that the goods do not answer the contract, and while the parties are in good faith negotiating for a new contract bankruptcy intervenes, there is nothing to prevent the vendors exercising the right of stoppage *in transitu*. The conduct of the vendee at the time of the supposed receipt of the goods is all important. If he refuse to accept the goods as his own under the contract which he made he holds the goods for

the vendor until returned, sold on account of the vendor, or some new contract be made in respect to them. While this is the condition of things I think it must be held that the goods are still *in transitu*.

The last case as to stoppage *in transitu* is *Ex parte Watson, Re Lone*, Weekly Notes, February 24, 1877, p. 42.

I agree in affirming the decision of Mr. Justice Galt, with costs.

WILSON, J., was not present at the argument, and took no part in the judgment.

*Judgment affirmed.*

## REGINA V. GUTHRIE.

*Tax sale of land vested in the Crown—Memorial—Admissibility of under 39 Vic. ch. 29, O.—Surrender to the Crown—Enrolment.*

Land vested in her Majesty in trust for the Indians was exempt from taxation under 13 & 14 Vic. ch. 67; and the defendant here claiming such land under a sale for taxes imposed in 1852 and 1853, was held not entitled.

A memorial, over thirty years old, executed by the grantor, was held admissible evidence and sufficient proof of the deed, in an action of ejectment, under 39 Vic. ch. 29, sec. 1 subsec. 3, and sec. 7, O.

Enrolment of a surrender to the Crown is unnecessary in this country in order to perfect the title of the Crown.

THIS was an action of ejectment, tried before Patterson, J. A., at the last Fall Assizes, at Whitby, to recover possession of lot 15 in the 2nd concession of Mara.

Her Majesty claimed title by deed of surrender from Wm. B. Robinson, the defendant merely asserting title in himself.

At the trial, in proof of the plaintiff's title, patent to Henry Fry, dated the 21st of March, 1843, for the lot was put in; also an original memorial from the registry office of a deed from Fry, dated 18th of November, 1843, to Wm. B. Robinson in fee. The memorial was executed by Fry, the grantor, dated the same day, and registered 23rd of



November, 1843, A deed of surrender of the lot in question from W. B. Robinson to Her Majesty in trust for the Chippawa Indians, dated 29th November, 1843, was also put in.

The defendant at the trial rested his defence on two grounds: 1st. That the title set up as being in Her Majesty by the surrender was defective—the memorial was no proof of the execution of the deed from Fry. 2nd. That the land in question had been sold for taxes in arrear from 1852 to 1859, and that he held title under the sheriff's deed, dated the 3rd of December, 1861, to one Hugh James McDonell, reciting a sale in 1860 for taxes. The defendant also put in deed of transfer from McDonnell to himself.

The taxes alleged to be due and in arrear, were from 1852 to 1859. On the part of the plaintiff it was contended that there was no evidence of taxes in arrear in 1852 and 1853, the only proof being that of a memorandum which the treasurer said he believed was a memorandum of taxes imposed by the county of York prior to the separation of Ontario. But assuming they were proved for those years the lands were exempt in 1854 under 16 Vic. ch. 182.

The learned Judge before entering a verdict, stated the grounds of his decision at length. He was of opinion, as to the defendant's title under the deed from the sheriff, that the lands were exempt under the Assessment Act, 16 Vic. ch. 182, and if they were liable before that Act, which he was inclined to think they were, the sale would then rest on the taxes for 1852 and 1853, but that even these were open to objection that the arrears for taxes for those years were not proved. The learned Judge, however, said he would hold that the conveyance from Fry to Robinson was not established by the proof of the memorial signed by Fry the grantor, and let the question be settled by this Court, as he did not think the 7th sec. of 39 Vic. ch. 29, O., applied, as in his opinion it did not substantially enact that those old memorials should be *primâ facie* evidence—they were only made so with reference to the provisions respecting vendors

and purchasers, which were limited to sales made after the Act, and on that ground he entered a verdict for defendant.

During last term, November 24, 1876, *Bethune*, Q. C., acting for the Attorney-General of Canada, obtained a rule *nisi* to enter a verdict for Her Majesty, on the ground that Her Majesty was entitled to recover the lands in question.

During this term, February 12, 1877, *M. C. Cameron*, Q. C., shewed cause. The Crown at the trial put in a patent to one Fry, and then claimed under a surrender in trust for the Indians by the Hon. W. B. Robinson. The Crown has therefore shewn title out of itself in the first instance, and it has not re-acquired title, for the surrender is insufficient, not being made by deed enrolled. The enrolment since verdict cannot avail the Crown, for the defendant cannot be put in a worse position than when the action was brought. The defendant claims under a sale for taxes, and the fact that the surrender was in trust for Indians does not relieve the land from assessment or make the sale invalid. 50 Geo. III, ch 7, sec. 2, exempts Crown lands only. The memorial of the deed from Fry to Robinson was no proof of a grant. He referred to *Chitty's Prerog.* 391 ; 13-14 Vic. ch. 27, sec. 7.

*Bethune*, Q. C. The memorial being over thirty years old was sufficient proof: *Gough v. McBride*, 10 C. P. 176; *Smith v. Nevilles*, 18 U. C. R. 473; *Lynch v. O'Hara*, 8 C. P. 259; *Rose v. Cuyler*, 27 U. C. R. 270; *Covert v. Robinson*, 24 U. C. R. 282; *Russell v. Fraser*, 15 C. P. 375; *Re Higgins*, 19 Grant, 393; 39 Vic. ch. 29, O. The enrolment dates back to the grant. There was no objection at the trial. [*M. C. Cameron*.—There was no consent to put in this enrolment.] *Chitty's Prerog.* 133; 17 *Vin. Abr. Prerogative*, 172 (A. d.) The defendant cannot say Her Majesty did not accept the surrender, for the bringing this action is an answer to it. The sale for taxes was invalid. No arrears of taxes were shewn. There was no evidence of any warrant. He referred to *Hall v. Hill*, 22 U. C. R. 578; *Hamilton v. Egleton*, 22 C. P. 536; *Munro v. Grey*, 12 U. C. R. 647.

March 10, 1877. MORRISON, J.—I am of opinion that Her Majesty is entitled a verdict with reference to the alleged arrears of taxes for the years 1852 and 1853.

It appears to have been assumed at the trial that lands held by Her Majesty in trust for the Indians were not exempt from taxation prior to 1854, but were liable during 1852 and 1853. The attention of the learned Judge was not directed by the parties to the state of the assessment law previous to the 16 Vic. ch. 182. The Assessment Act in force at the passage of that Act, the 13–14 Vic. ch. 67, 1850, expressly and in the same terms exempted all property vested in Her Majesty in trust for the Indians. So that the lands in question were not liable to be rated and sold for arrears of taxes for 1852 and 1853, and consequently the tax title under which the defendant claims is of no avail.

But it is contended that the plaintiff failed to shew title in Robinson, who executed the deed of surrender to Her Majesty. The plaintiff put in the original memorial of a deed from Fry to Robinson, dated the 18th of November, 1843, conveying the fee in the premises to Robinson. The memorial was executed on the same day and registered on the 23rd of the same month in the proper county, and the plaintiff relied on that memorial (being over 30 years old) as *primâ facie* evidence of the conveyance from Fry to Robinson, under sec. 7 of 39 Vic. ch. 29, O.

By the first section of that Act it is provided, that in the completion of any contract of sale of land made after the passing of the Act, the rights and obligation of vendors and purchasers shall be regulated by rules therein mentioned. The 3rd sub-section is, "In case of registered memorials twenty years old, of other instruments, if the memorials purport to be executed by the grantor, the memorial shall be sufficient evidence without the production of the instruments to which the memorials relate, except so far as such memorial shall be proved to be inaccurate, and the memorials shall be presumed to contain all the material contents of the instruments to which they relate." And

by the 7th section it is enacted: "In suits at law or in equity it shall not be necessary to produce any evidence which, by the first section of this Act, is dispensed with as between vendor and purchaser; and the evidence therein declared to be sufficient as between vendor and purchaser shall be *primâ facie* sufficient for the purposes of such suits."

I agree with Mr. Justice Patterson that there is some difficulty in arriving at a clear conclusion as to the intention of the Legislature in enacting the 7th section. I am inclined to think, however, that it was the object of the Legislature, with a view to facilitate and simplify the proof of titles in ordinary suits, to extend the provisions of the first section to any suit at law or equity. The tendency of legislation is in that direction, and I think properly so. The language of the seventh section is wide and general enough for such a construction. There is nothing in the section restricting the rules mentioned in the first section to any particular class of suits or litigation, and I see no injurious consequences to result from giving such proof, as it is only received as *primâ facie* evidence. If the section is not open to such a construction, I cannot see for what other object it was introduced.

In the fifth and sixth sections we find provision made for matters quite distinct from matters relating to vendors and purchasers, and by the fourth section in proceedings in Chancery to quiet a title. The rules in the first section are also made applicable, and it appears that in suits in Chancery, under the seventh section, such memorials are received as *primâ facie* evidence. Such is the view taken of that section and acted upon by Blake, V. C.

On this objection I think the plaintiff is entitled to our judgment.

During the argument it was said that Her Majesty could only take the surrender by deed enrolled. No such objection appears to have been taken at the trial. The surrender appears to have been registered in the county registry office in January, 1864, and since the trial it has



been enrolled and put on record in the office of the Registrar General for the Dominion, where all grants by and to the Crown are registered, and an exemplification of the surrender under the great seal of the Dominion has been produced and filed in this Court as well as the original deed of surrender, and Mr. Bethune, on the part of the Attorney-General, has asked if it is necessary that it should be enrolled of record in this Court, and he has referred us to the authorities mentioned in 17 *Vin. Abr.* 172 (A. d). The question as to how a grant to the King may be made effectual or what should be a sufficient record of it, is far from being clear. The point is discussed in the notes to the case of *The Duke of Somerset*, Dyer 355-37. According to Dyer a deed was made by the Duke to King Edward VI., and was acknowledged to be enrolled and delivered to the Master in Chancery and delivered in Court. It was put into a chest and not enrolled, and it was held not to vest any interest in the Queen.

This is denied.

The note states that Sir Thomas Egerton, Master of the Rolls, said when he was attorney he had occasion to ask the opinion of Wray and Manwood, Chief Justice and Chief Baron, who denied that their opinions were as Dyer reported, and they said that there is no foundation that the King cannot take but by matters of record; for he said that the King is entitled in many things which are in files on the rolls and in the memorandums in the Exchequer; and yet these are sufficient titles for the King.

About 35 Eliz. this same case came in question between the Dean and Canons of Windsor, cited Mo. 676, and one Middlemore, and by the resolution of all the Judges of England it was agreed that the deed may be enrolled at this day, and so it was, and therefore Middlemore was ousted of his term, and it was also debated in the Parliament house and there also agreed accordingly. And it was also resolved by all the Justices that the acknowledgment of the deed before the Master in Chancery and delivering of it in the Augmentative Court do not make it a sufficient

record before enrolment to vest the interest in the King, but when it is now enrolled with the other date it vests the interest in the King with relation, for all men are estopped to say that it is not enrolled according to the date. The contrary, the note says is holden, for if it be on the files, or in any place among the memoranda of the Exchequer, it is sufficient for the King, and in Easter 30 Eliz. in the Exchequer the case of Dyer was denied to be law, and Manwood denied his opinion to be so, for after the acknowledgment the delivering of the deed to be enrolled in Court makes it a record, and in *Abraham v. Wilcox*, Yelv. 30 adjudged the King takes not by enrolment but by the deed, so that the deed is the principal and the enrolment but testimony that the deed is of record; and though it is usually said in the books that the King cannot take but by deed enrolled this is to be intended only that the deed made to the King be recorded.

On the whole, upon this point we see no ground for holding that Her Majesty is not entitled to succeed. This deed of surrender is recorded in the usual registry office of the county. It is now enrolled and on record, as the exemplification under the great seal of the Dominion shews, in the record office where all patents and deeds to Her Majesty are recorded, and it is brought into Court to be enrolled here if necessary.

The rule will be absolute to enter a verdict for the plaintiff.

HARRISON, C. J.—The first question is, as to the title of the Queen.

The Crown is *prima facie* seized of all the land in the Province: *Attorney-General v. Harris*, 33 U. C. R. 94. The Queen has, upon the information of intrusion, the prerogative right of putting the defendant on shewing his title specially: *Chitty's Prerogatives of the Crown* 332; *Manning's Ex. Prac.* 198. The first innovation on this rule was made by 21 Jac. I. ch. 14, which provided that whensoever the King, &c., have been out of possession by the

space of twenty years, &c., the defendant shall retain the possession he had, &c., until the title be tried, found, or adjudged to the King: *Attorney-General v. Stanley*, 9 U. C. R. 84. Unless it appear that the Crown having had possession was out of possession for twenty years, the Crown without proof of title on the part of the defendant must, on an information of intrusion, recover: *Regina v. Sinnott*, 27 U. C. R. 539. Where the statute 21 Jac. I. ch. 14, is inapplicable the Crown is not barred unless there be sixty years possession against the Crown: *Regina v. McCormick*, 18 U. C. R. 131.

Now the Queen has the power, if she think fit, instead of filing an information of intrusion, to bring an action of ejectment: 35 Vic. ch. 13 sec. 18, O. It is among other things argued that the effect of an appearance in such an action is, to put the plaintiff to actual proof of title, and therefore that the presumptions which would arise in favour of the Crown on an information of intrusion are inapplicable. This is one of the difficulties of the Crown waiving prerogative remedies and adopting the remedies of the subject. It is not necessary for us in this case to settle the difficulty if we are of opinion that there was independent evidence of the title of the Crown.

This depends on whether the memorial of the conveyance under which the Crown claims was admissible in evidence, and this in its turn depends on whether the memorial was in this suit admissible in evidence under 39 Vic. ch. 29, O.

It is entitled "An Act to amend the law of vendor and purchaser and to simplify titles." This would be an appropriate title to the Act if it had stopped at the end of the third section. But the remaining sections of the Act carry the original purpose much beyond the mere object of simplifying titles as between vendor and purchaser. The title should be "An Act to amend the law of vendor and purchaser, and to simplify titles, *and for other purposes.*"

The Act is divisible into three distinct parts.

1. Provisions necessary "in the completion of any con-

tract of sale of land," as between vendor and vendee. For this purpose in case of memorials twenty years old, if the memorials were executed by the grantor, or in other cases if possession has been consistent with the registered title, the memorials are sufficient evidence without the production of the instruments to which the memorials relate, except so far as such memorials shall be proved to be inaccurate: Sec. 1, sub-sec. 3.

2. "In proceedings in Chancery to quiet a title" it is unnecessary to produce any evidence by the previous part of the Act dispensed with as between vendor and purchaser: sec. 4.

3. "In suits at Law or in Equity," it is also unnecessary to produce any evidence, dispensed with as between vendor and purchaser: Sec. 7.

Then follow sections 5 and 6, which are foreign to rules of evidence, but still germane to the purposes of the Act.

The idea originally was to simplify evidence necessary in the completion of a contract as between vendor and purchaser. That idea was in section 4 expanded so as to apply to proceedings in Chancery to quiet a title. And in section 7 it is still further expanded, and so expanded as to apply to all suits at "Law or in Equity."

In my opinion, therefore, the memorial was admissible evidence, if necessary, on the part of the Crown in this suit to prove title.

I cannot think enrolment in this country is necessary to perfect the title of the Crown. See *Hambly v. Fuller*, 22 C. P. 141.

It appears that the title of the Crown was proved, and the Crown entitled to recover unless the title of the defendant was proved.

I think, for the reasons given by my brother Morrison, that the title set up by the defendant failed.

I concur in making the rule absolute to enter a verdict for the Crown.

WILSON, J., was not present at the argument, and took no part in the judgment.

*Rule absolute.*



## REGINA V. MCDONELL.

THIS was a case similar to the preceding and argued at the same time, the only difference being that the defendant here did not claim under a tax or other title, but rested his defence upon the Queen not having proved her title.

Rule absolute to enter a verdict for Her Majesty.

*Rule absolute.*

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## MEMORANDA.

During this term the following gentlemen were called to the Bar:—

ALBERT CLEMENTS KILLAM, THOMAS HODGKIN, CORNELIUS JOHN O'NEIL, FRANCIS BEVERLEY ROBERTSON, HENRY ERNEST HENDERSON, HAMILTON CASSELS, FRANCIS LOVE, WILLIAM WYLD, THOMAS CASWELL, GEORGE EDMINSON, FREDERICK WILLIAM COLQUHOUN, EDWARD O'CONNOR, JOHN BERGIN.

## SITTINGS IN VACATION

AFTER HILARY TERM, 1877.

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### IN RE HENRY MALONE AND THE CORPORATION OF THE COUNTY OF GREY.

*Temperance Act of 1864—Voting on by-law—Poll closed too soon—Absence of Reeve—Notice of meeting.*

A by-law under the Temperance Act of 1864 having been carried in a county by a majority of 794, it appeared that in one township, where there were over 800 names of qualified electors on the roll, only two days' polling were allowed, leaving 399 votes unpolled in that township. On the second day more than half an hour elapsed without a vote being tendered, but the poll was not closed on that account. *Held*, no ground for setting aside the by-law, for the number of votes left unpolled were not sufficient to have affected the result of the election. It was argued that the premature closing of the poll in this township caused those opposed to the by-law in two other townships, in which over 600 votes were left unpolled, to relax their efforts, and so that the result was or might have been affected by it; but *Held*, that this was a consequence too remote to be considered.

There must be three days' polling where the names on the roll exceed 800, though they may be less than 1200.

It is not necessary that the notice of taking the vote should specify the number of days' polling to be allowed, though it would be more convenient.

The reeve in one of the townships was present at the commencement of the meeting, and presided during the first day, but was absent during the second day, when the clerk was in attendance. *Held*, that this, in the absence of anything improperly done or omitted in consequence, or of any effect on the result in that township, was not a fatal objection.

*Quære*, whether it would have been different had the by-law been one of that township only.

On April 17, 1877, *H. J. Scott* obtained a rule *nisi* calling on the Corporation of the County of Grey to shew cause why by-law No. 235 of that county, to prohibit the sale of intoxicating liquors within the county of Grey under the Temperance Act of 1864, should not be quashed with costs, on the grounds :

1. That the poll for taking the votes of the duly qualified electors upon the said by-law for the township of Bentinck was closed too soon, and should have been kept open for one day longer, there being upon the assessment roll of the said township 867 voters, and the said poll having been kept open only for two days.

2. That the notice published under the Act, of the taking of the vote upon the said by-law, should have stated the number of days upon which the said vote would be taken in the different municipalities, whereas it merely states that the vote would be taken on 20th September, 1876.

3. That at the poll held in the township of Sydenham, the same was presided over by the deputy reeve of the said township and not by the reeve, and the said deputy reeve was not chosen by the meeting of the electors at such poll.

4. That the poll held in the township of Proton was not presided over by the reeve of the said township ; but the said reeve, although professing to preside over the said poll, was absent during the greater portion of the time of the taking of the said poll, and a great number of the votes taken at the said poll were taken by a person unauthorized to take such votes by any meeting of the electors at such poll named by the clerk of the said township.

And on grounds disclosed in affidavits and papers filed.

The by-law moved against was in the following form :—

*By-Law No. 235 :*

To prohibit the sale of intoxicating liquors within the county of Grey, under the Temperance Act of 1864.

The Council of the Corporation of the county of Grey, subject to the approval of the municipal electors of the county, to be ascertained in manner provided by the Temperance Act of 1864, enact as follows :

1. The sale of intoxicating liquors and the issuing of licenses therefor is by the present by-law prohibited within the County of Grey under the authority and for enforcement of the Temperance Act of 1864.

Dated 23rd June, 1876.

[Seal.]

(Signed)

JOSEPH RORKE, *Warden.*

JOHN GALE, *Ass't. Co. Clerk.*



The notice of polling thereto was in the following form :—

Pursuant to the Temperance Act of 1864 notice is hereby given to all whom it may concern, that on Wednesday the 20th day of September, A.D. 1876, at the hour of 10 o'clock in the forenoon, a meeting of the municipal electors of and for each municipality in the county of Grey will be held for the taking of a poll to decide whether or not the above by-law is approved by such electors, at the places following, that is to say :—

The municipal electors of and for the town of Owen Sound, at the Town Hall therein, &c. (So as to the remaining local municipalities in the county.)

(Signed) GEO. J. GALE, *County Clerk, County of Grey.*

The total number of votes polled for the	
by-law was .....	4071
Against it.....	3277
	<hr/>
Majority for by-law .....	794
Total vote polled.....	7348

This was the largest vote ever cast in the county for Parliamentary or any other election.

The number of votes polled for the by-law	
in the township of Bentinck was for the	
by-law .....	247
Against it.....	221
	<hr/>
Majority for by-law.....	26
Total vote of Bentinck polled .....	468
Bentinck vote unpolled.....	399
	<hr/>
Total vote according to the roll of Bentinck.....	867
Of those named on the roll of Bentinck it	
was said there were females .....	30
Assessed for less than \$100.....	28
Dead .....	4
Non-residents of township .....	20
Non-residents of county.....	20
Names of persons twice on the roll .....	2
	<hr/>
	104
	<hr/>

Deducting these, the electors of Bentinck were... 763

The poll in the township of Bentinck was kept open only for two days, the belief of the presiding officer being that there were less than 800 names of qualified electors on the roll.

On the second day more than half an hour elapsed without a vote being tendered, but the poll was not closed on this account.

Affidavits were filed on the part of the relator to shew that at least two voters, whose names were given, on the third day presented themselves at the polling place in the township of Bentinck for the purpose of voting against the by-law, but the polling was closed.

The polling places in Collingwood and Normanby townships were, however, kept open for three days. But it was said that in these townships little effort was made on the third day to defeat the by-law in consequence of the large majority against the by-law at other polling places, in all of which the polls were closed on the second day.

The votes unpollled in Collingwood were...	372
In Normanby .....	294
Total.....	666

Affidavits in answer were filed to shew that the majority of the unpollled votes in Collingwood and Normanby were in favour of the by-law, and not against it.

In the township of Proton the poll was kept open for two days. There were 204 for and 181 against the by-law. No complaint was made as to the number of days polling. But it was contended that the reeve did not preside during the whole of the two days. He did preside the first day, but on the second day was absent. The clerk, however, except during a short interval for dinner, was in attendance each day. It was not shewn that the non-attendance of the reeve on the second day in any manner affected the result of the election.

May 11, 1877. *Osler, Creasor* with him, shewed cause. There was no irregularity in closing the poll in Bentinck on the third day, but even if there were, as the whole

unpolled vote of the township was not equal to the majority in favour of the by-law, the result was not affected, and could not be affected by the supposed irregularity: *Re Johnson and The County of Lambton*, 40 U. C. R. 297. The notice of the voting appended to the published copy of the by-law was in form sufficient, and it is not shewn that the irregularity, if any, as to the form of the notice could in any manner have affected the result: *Re Day and Storrington*, 38 U. C. R. 528; *Re Wycott and Ernestown*, *Ib.* 533. The third objection is not sustained as a matter of fact. So far as the township of Proton is concerned the reeve did all that was necessary, but if his absence on the second day was irregular it is not shewn to have in any manner affected the result of the election: *Re Monck Election*, 32 U. C. R. 147; *Second Monck Election*, 12 C. L. J. N. S. 113; *Re North Victoria Election*, 10 C. L. J. N. S. 217, 229; *Second Victoria Election*, 11 C. L. J. N. S. 163, in appeal, 37 U. C. R. 234.

*Scott*, contra. The closing of the poll in Bentinck on the third day was fatal to the by-law. But for such closing a larger vote would have been cast against the by-law in Collingwood and Normanby, so that the result might have been different.: *Re Johnson and The County of Lambton*, 40 U. C. R. 297. The notice of the polling was defective in not stating the number of days for which each polling place would be kept open. The absence of the reeve of Proton, on the second day of the voting in that township, whether it affected the result of the election or not, was fatal to the by-law: *Regina v. Backhouse*, 12 L. T. N. S. 579; *Re Brophy and Gananoque*, 26 C. P. 290. Through some inadvertence, the third objection is not sustained by the affidavits for the rule.

May 15, 1877, HARRISON, C. J.—The evils arising from the excessive use of intoxicating liquors are wide-spread and difficult of repression.

The Legislature, for remedy, by the Temperance Act of 1864, has subject to certain checks, delegated to the

Municipal Councils and to the electors in local municipalities the power to pass by-laws prohibiting the sale of intoxicating liquors in their municipalities.

The Legislature has accompanied the delegation of power with this declaration: "That no by-law passed under authority and for enforcement of this Act shall be set aside by any Court for any defect of procedure or form whatever." See sec. 37.

All Courts, therefore, when asked to set aside a by-law passed by any Municipal Council, or the electors of any municipality, for enforcement of the Temperance Act of 1864, are obliged to regard this declaration of the Legislature, and, as far as possible, give effect to it.

I doubt if full effect was given to it in *Coe v. Pickering*, 24 U. C. R. 439, or in *Re Miles and Richmond*, 28 U. C. R. 333; reluctantly followed in *Re Brophy and Gananoque*, 26 C. P. 290. But in *Re Boon and Halton*, 24 U. C. R. 361; in *Re Lake and Prince Edward*, 26 C. P. 173; and in *Re Wycott and Ernestown*, 38 U. C. R. 533, full effect was given to it.

It is possible that the decisions under the statute may be distinguished so as to avoid any actual inconsistency between them, but in the view which I take of the present application it is not necessary to make the attempt to reconcile them.

The rule laid down in *Re Johnson and Lambton*, 40 U. C. R. 297 is, that a by-law passed under the Temperance Act of 1864, is not to be set aside for irregularity in the passing of it unless it appear that but for the irregularity the result of the polling might have been different.

The number of days polling in each municipality is, under the Act, to be regulated by the number of names of the qualified municipal electors on the assessment roll of each municipality. If no more than 400, one day; if more than 400 and not more than 800, two days; and so on, "allowing one additional day for each additional 400 names": Sec 5, sub-sec. 6.

Mr. Osler contended that there are not three days polling



required unless there be at least 1200 names of voters on the roll. I do not accede to this contention. The effect of it would be to hold that unless there are at least 400 names on the roll there is not to be any day for polling. Four hundred and under one day; eight hundred and under, but above four hundred, two days, twelve hundred and under, but above eight hundred, three days polling, appears to be the proper construction of the section.

Some question was made in the affidavits, but not on the argument, as to whether there are really the names of 800 qualified municipal electors on the roll of Bentick. The apparent number is 867. But deducting the names of females, deceased voters, and others, it is claimed that the number is much less than 867. Without deciding whether it is competent on such an application as the present to make a scrutiny of the roll (a), I am satisfied that there are more than 800 names of qualified electors on the roll, and whether the number is 801 or 867 is immaterial for the purposes of the present application.

I am therefore of opinion that the poll in the township of Bentick was irregularly closed on the second day of polling. It is true that "if any time after the opening of the poll one half hour elapses without a vote being offered the poll may be closed": sec. 5, sub-sec. 5. But it is not suggested that this discretionary power was exercised. On the contrary, it is shewn that the closing on the second day was the result of the mistaken view of the presiding officer.

But supposing that within the two days every vote in the township had been polled, would it not be absurd to set aside the by-law because the poll was not kept open on the third day, when no voters could or would have attended for the purpose of voting? If it appeared that at the close of the poll on the second day there was a sufficient number of votes in Bentinck unpollled to overcome the majority on the whole poll in favour of the by-law, so that the result

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(a) See *Re Hamilton and the Corporation of the County of Brant*, post p. 253.

might be said to have been affected by the improper closing of the poll, I would have followed *Re Johnson and The County of Lambton*, 40 U. C. R. 297, and set aside the by-law. But this does not appear. The whole vote unpolled in Bentinck did not, at the closing of the poll, exceed 399, and the majority in favour of the by-law is 794.

It is argued, however, that in consequence of the premature closing of the poll in Bentinck those against the by-law in Collingwood and Normanby on the third day relaxed their efforts, leaving 666 votes unpolled in those townships and, so, adding thereto the 399 unpolled in Bentinck, the result was affected. I do not understand either this argument or its application. If polls in some municipalities were prematurely closed, the greater would be the necessity for increased exertion in the municipalities where the polls were not prematurely closed. The area of the fight would be thereby narrowed, and the greater the necessity for vigorous resistance on the part of those opposed to the by-law. Even if there was no hope of victory the majority in the whole county might have been reduced, and so reduced as to bring it within the apparent majority in Bentinck, and lead to the conclusion that the result might have been affected by the irregularity in closing the poll in that township. But where the effect arises not only from the irregularity in Bentinck, but the supineness of the voters in Collingwood and Normanby, I do not think the argument is of any avail.

I do not think that I can, where an irregularity in the closing of the poll in a particular municipality is the cause of complaint, go out of that municipality for the purpose of deciding the question whether the result might have been different had there been a different state of facts in that municipality. The poll is kept open for the use of voters in that municipality. If all the votes in that municipality were polled, or are counted as polled on the side of those complaining of the irregularity, and yet the result cannot properly be said to be affected, the fact that other electors in another municipality did or omitted to do some-

thing which they would not have done, or have done under different circumstances, is altogether too remote to influence the decision of the question as to the result of the election. It might be different if the voters of the county were permitted to vote at any polling place in the county; but so long as each municipality is distinct from the others for the purposes of polling votes, each municipality must be kept distinct in considering whether the result in that municipality would have been different had there been no irregularity.

In my opinion the first ground assigned for the quashing of the by-law fails.

There is nothing in the Act which sustains the second ground of objection. The only direction as to the notice is, that contained in sec. 5 of the Act. The notice is to be signed by the clerk, and to signify "that on some day within the week next after such four weeks, at the hour of ten in the forenoon, and at some convenient place, \* \* \* named in the notice, a meeting of the municipal electors of the municipality (or if the by-law is for a county, then for each municipality in the county) will be held, for the taking of a poll, to decide whether or not the by-law is approved, or is adopted, (as the case may be), by such electors."

All that the statute requires to be stated in the notice is, the day of the meeting, the place of the meeting, and the purpose or object of the meeting. The duration of the meeting, whether one, two, three or more days, is made to depend upon the number of names of qualified municipal electors on the assessment roll: Sub-sec. 6.

It would be more convenient, and better calculated to prevent surprise, if the notice were to state not only the day of the meeting but the duration of the meeting; but the Legislature as yet has not made that necessary.

The third objection was abandoned at the argument.

The remaining objection, which, on the authorities, is the most formidable of all, is based on the ground that the reeve of Proton, although present at the commencement of

the meeting in that township, was absent during the second day of the polling.

The statute declares that "at such meeting the mayor or reeve of the municipality in which the same is held, or in his absence such other member of the municipal council thereof as may be chosen by the meeting, or if no such member is present then any municipal elector who may be chosen by the meeting, shall preside, and shall have all the powers for the preservation of the public peace which by law are vested \* \* \* in the returning officer at any municipal election in Upper Canada," &c.: Sub-sec. 3.

It is made the duty of the person presiding at the close of the poll to count the yeas and nays, and ascertain and certify on the face of the poll book the number of votes given for and against the by-law respectively: Sub-sec. 8.

The reeve was present when the meeting was commenced and did preside during the first day of the meeting, but for some cause not satisfactorily explained absented himself during the second day of the polling.

It is not pretended that anything was done or omitted which would not have been done or omitted if the reeve had presided on the second day of the election, or that the result would have been otherwise than it was in Proton had he performed the whole duty cast upon him by the statute.

If this were the by-law of a township council, and the reeve or other proper officer had not presided at all at the meeting, the authorities would compel me to set aside the by-law, whether the result was affected or not: *Regina v. Backhouse, et al.*, 12 L. J. N. S. 579; *Re Hartley and the Township of Emily*, 25 U. C. R. 12.

In the latter case, Draper, C.J., said, at p. 15: "It cannot be a mere matter of procedure or form that there should be no person presiding at the meeting in whom is vested the authority for conducting the election and for maintaining peace and order, to whom the Legislature has entrusted the counting the votes and certifying the result."

Occasional absence, however, of the presiding officer is not to be deemed an omission to preside for the purposes of the Act: *Re McLean and Bruce*, 25 U. C. R. 619.



Hagarty, C.J., in the latter case said, at p. 620: "We must not too rigidly construe the statutable direction that the reeve, &c., shall preside. In the case made out for the defendants, we cannot say that the clause in the Act was not substantially complied with. An over strictness of construction would open the door to innumerable objections of a technical character to almost every township meeting held by the ratepayers, who, generally without legal advice, are obliged to perform the many duties and go through the many forms prescribed by the Municipal Acts. There seems no reason to suspect that there was any unfairness in the conduct of the voting; and we think, on the whole evidence before us, we must discharge the rule."

The tendency of the more recent decisions under the Temperance Act of 1864 is to lean more to substance and less to form than in the earlier cases.

But there is no decision which constrains me to set aside this by-law, in the absence of any imputation of wrong doing or wrong result, for the mere neglect of the reeve to preside at the meeting of the electors from the beginning to the end, without intermission of any kind, and I am not inclined to make such a precedent.

I need not decide what I would do if the by-law were that simply of the township of Proton, for the by-law moved against is that of the county of Grey.

Where the by-law is for a county, the warden of the county counts and adds up from each poll-book the total number of the "yeas" and of the "nays" respectively, in all the municipalities forming the county, and certifies the same in writing, and such certificate countersigned by the clerk is to be deposited and kept with the poll-books, among the records of the County Council. Sub-sec. 9.

In such an election, the reeve of a township is, in substance, no more than the returning officer of that township. And in such a case it would, I think, be against the spirit of the Election Law, as now understood, to set aside a county election for mere neglect or misconduct of a local returning officer, which neglect or misconduct in no

manner prejudiced or affected the election : *Regina ex rel. Walker v. Mitchell*, 4 P. R. 218 ; *Hackney Case*, 2 O'M & H. 77 ; *Woodward v. Sarsons*, L. R. 10 C. P. 733 ; *First Monck Election Case*, 32 U. C. R. 147 ; *Second Monck Election Case*, 12 C. L. J. N. S. 113 ; *Shaw v. Thompson*, L. R. 3 Ch. D. 233 ; *Re Johnson and The County of Lambton*, 40 U. C. R. 297 ; *Regina ex rel. Preston v. Touchburn*, 6 P. R. 344.

The application, in my opinion, fails on all the grounds.

*Rule discharged, with costs.*

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#### O'NEIL AND THE CORPORATION OF THE COUNTY OF OXFORD.

##### *Temperance Act of 1864.*

A by-law passed under the Temperance Act of 1864, to prohibit the sale of intoxicating liquors and the issue of licenses therefor within a county, provided that it should come into force on the first day of May. *Held*, illegal, as being contrary to the Act, which declares that such by-laws shall come into force from the first of March next after the communication thereof to the collector of inland revenue, and shall contain only the simple declaration of prohibition.

February 20, 1877. *Osler* obtained a rule *nisi* to quash by-law 212, which was as follows : By-law of the Municipal Council of the Corporation of the County of Oxford, to prohibit the sale of intoxicating liquors and the issue of licenses therefor within the County of Oxford, passed 15th February, 1877. Whereas, under the provisions of an Act of the Parliament of the Province of Canada (reciting the title of 27-28 Vic. ch. 18,) the Municipal Council of every county, city, township, parish, or incorporated village in this Province, shall have power, at any time, to pass a by-law for prohibiting the sale of intoxicating liquors and the issue of licenses therefor, within such county, &c., under authority, and for enforcement of the said Act, and subject to the provisions and limitations by the said Act enacted. And whereas it is expedient to prohibit the sale of intoxicating liquors, and the

issue of licenses for the sale thereof, within the county of Oxford. Be it further enacted by the Municipal Council of the Corporation of the County of Oxford, that the sale of intoxicating liquors, and the issue of licenses therefor, is prohibited within the county of Oxford. And be it further enacted, that this by-law shall come into effect and be in force on and after the *first day of May*, in the year of our Lord 1877. And be it further enacted, that the votes of the electors shall be taken at the times, and places set forth in the by-law.

The objections taken to the by-law were: 1. The statute entitled The Temperance Act of 1864, was repealed or superseded by subsequent legislation. 2. The said by-law was not passed in accordance with the requirements of the Temperance Act of 1864, or of any other existing statute in that behalf. 3. The said by-law is in direct contravention of the second and eighth sections of the said The Temperance Act of 1864. 4. The said by-law is illegal, on the ground that it provides that it shall come into force on the first day of May, 1877; whereas the statute under which it is professed to be passed, specially provides that such by-law shall come into force on a day other than the first day of May. 5. That if, notwithstanding the enactment of the by-law, that the same shall come into force on the first day of May, 1877, the same, if in other respects a valid by-law, will come into force, and take effect from the first day of March, 1877, the electors of the county, or a large number of them, were misled into voting for the said by-law, in the belief that it would not take effect before the first day of May, 1877. 6. That the said by-law is in other respects defective.

March 13, 1877. *Ball*, Q.C., and *Kerr*, Q.C., shewed cause. *Bethune*, Q.C., and *Osler*, for the relator.

The arguments and cases cited sufficiently appear in the judgment.

March 16, 1877. GALT, J.—It was admitted by the

learned counsel for the relator, that so far as the first objection was concerned, it was concluded by the case of *Lake and Prince Edward*, 26 C. P. 173 ; they were not however to be considered as abandoning it, in case the opinion of a higher Court should be taken on the subject of this application. The other objections resolve themselves into this, namely, that the by-law is invalid, because it contains a provision that it shall come into force on 1st May ; whereas by the Temperance Act of 1864, the time at which all by-laws passed under that Act are to take effect is expressly stated to be the 1st of March.

The second section of the Temperance Act is : " Such by-law shall be drawn up and passed in ordinary form ; and shall not have embodied therein any other provision than the simple declaration that the sale of intoxicating liquors and the issue of licenses therefor is by such by-law prohibited, within such county, city, town, township, parish, or incorporated village, under authority and for enforcement of this Act."

Sec. 8. " As regards the prohibition of issue of licenses, every such by-law shall come into force from the day of the communication thereof to the collector of inland revenue ; and, as regards the prohibition of such sale, and otherwise, every such by-law shall come into force in Upper Canada, from the first day of March next after that day."

There are certain contingencies mentioned in this section, which it is unnecessary to mention, as they do not apply to the present case. At the time when this Act was passed licenses were dated on 1st March in each year, and were to continue in force for a year, but by 39 Vic. ch. 26, sec. 24, the year during which licenses are to be in force shall begin on the first day of May in each year, and end on the 30th day of April, in the year following ; and provision is made for the continuance of the then existing licenses. By the Municipal Act of 1873, sec. 372, sub.-sec. 14, county municipalities are empowered to pass by-laws for prohibiting the sale of intoxicating liquors, and the issue of licenses therefor,



according to the provisions and limitations contained in the Temperance Act of 1864. By sec. 27 of the said Act of 39 Vic. : " Nothing in the said recited Act (37 Vic. ch. 32,) or this Act shall be construed to affect or impair any of the provisions of the 'Temperance Act of 1864' of the late Province of Canada, all of which, so far as the same are within the jurisdiction of this Legislature, are declared to be in full force and effect ; and no tavern or shop license shall be issued, or take effect within any county, \* \* within which any by-law for prohibiting the sale of liquor under the said Act is in force."

There are two questions to be considered : first, does the by-law now in question comply with the conditions of the Temperance Act of 1864 ? I am constrained to say that in my opinion it does not, for this statute expressly states that any by-law passed under its powers shall come into force on the first day of March next after the day of the communication thereof to the collector of Inland Revenue ; whereas, in this case it is expressly enacted that this by-law shall come into effect and be in force on and after the first day of May, 1877. It was however, in the second place, strongly argued by the learned counsel for the county, that this limitation might be rejected as surplusage, as was done with respect to an objection taken in the case of *Boon and the Corporation of Halton*, 24 U. C. R. 361. I fear, however, that cannot be done here. The limitation of time forms an essential part of the by-law, and is in contravention of the second section, which is positive, that the by-law shall not have embodied therein any other provision than the simple declaration, that the sale of intoxicating liquors and the issue of licenses therefor is by such by-law prohibited.

The statute having fixed the time when all by-laws shall come into force, it appears to me that to ask the assent of the electors to a by-law, qualifying its operation by reference to a date other than that fixed by law, is embodying a provision other than the simple declaration above mentioned. If this could be done, there is no

reason why any other day other than the first of May might not as well have been fixed. We can readily see why the first of May was named; it was because under the 39 Vic. ch. 26, sec. 24, all existing licenses come to an end on the 30th April, and no doubt the by-law was framed to meet the change effected by that provision; but, unfortunately, by the 27th sec. it is enacted that *nothing* in this Act shall be construed to affect or impair *any* of the provisions of the Temperance Act, *all* of which are declared to be in full force and effect, and, therefore, unless I can reject the day when it is to take effect, as forming no element for the consideration of the electors I must hold that the by-law does contain more than the simple question of prohibition.

In *Boon and the Corporation of Halton*, 24 U. C. R. 361, the objection was, that the by-law contained a provision repealing a former by law, but the Court refused to give effect to it. Draper, C.J., in giving judgment, at page 363, said: "The object of the second section appears to be to ensure that the single question, whether the sale of intoxicating liquors and the issuing of licenses for that purpose shall be prohibited, should be submitted to the electors, and (by sub-sec. 4 of sec. 5) it is further provided that they shall vote only "yea" or "nay" upon that question. If, therefore, the second section of this by-law does really present another and different question, the proceeding is contrary to the intent of the Legislature, plainly expressed. But before deciding this, the by-law No. 41 must be looked at, and there we find that it contains in identical words the same prohibition, which is enacted in the first section of by-law No. 42. The recital contained in No. 41 is obviously unimportant."

There have been numerous affidavits filed on this application, shewing that the date at which the by-law was to take effect had an important and material influence on the voters, and it cannot therefore be said that it does not really present another and different question for their consideration, other than the simple one of prohibition. I feel

therefore that the objection is entitled to prevail, and the rule must be made absolute."

*Rule absolute.*

# IN RE STRACHAN AND THE CORPORATION OF THE COUNTY OF FRONTENAC.

*County corporation—Grant to roads and bridges—Equalization of rolls.*

A county council by by-law granted moneys to different municipalities in the county, to assist said municipalities "in preserving, improving, and repairing roads and bridges therein," and to be expended by such municipalities "where required, as they may deem expedient for the benefit of the public of said county." It was alleged that these moneys were a portion of surplus funds derived from various sources, not required for the current year's expenditure, and it appeared that similar grants had been made in previous years.

*Held*, that the by-law was clearly *ultra vires*, and must be quashed.

The assessment of two municipalities had been decreased, and that of two others increased by the County Judge, after the equalization made by the county council, and it appeared that one object of the by-law was, to make this up to the municipalities so increased, the two which were reduced receiving no grant by the by-law, and the grant to the other two being increased by the amount which the Judge had put on against them. Remarks upon such attempted evasion of the law.

ON October 17, 1876, before Mr. Justice Morrison, sitting for the full Court, *Ewart* obtained a rule calling upon the council of the county of Frontenac to shew cause why by-law numbered 138 of the council, for granting money to certain municipalities, passed on the 29th of September, 1876, should not be quashed, on the following amongst other grounds:—1. That the by-law is *ultra vires*. 2. That it is uncertain and vague, in not naming and describing the roads or bridges on which the money is to be applied. 3. That the council can only aid in the construction of new roads and bridges, and cannot contribute to the repair of township roads. 4. That when the by-law was passed the county rate for the year had been struck, and no provision was made for the expenditure authorized by the by-law on the said rate, and the by-law is bad because it provides no means for payment of the amount to be expended.

There was filed on the motion, an exemplification from the office of the clerk of the County Court of the County of Frontenac, shewing in what manner the county council had settled the assessment of the different municipalities of the county, and in what manner the Judge of the County Court had altered them upon Appeal.

The Judge finally settled the roll on the 17th of July 1876, and on the 29th September thereafter the by-law in question was passed, and by it the county council "deeming it expedient to make grants of sums of money to the several municipalities hereinafter mentioned, to aid and assist said municipalities in preserving, improving, and repairing roads and bridges therein \* \* That the said several sums of money shall be expended by the respective local municipalities where required, as they deem expedient for the benefit of the public of said county."

The following is a list of the municipalities in the county shewing the amounts at which the council of the county passed the assessments, and those at which the Judge of the County Court settled them upon appeal, and of the grants which the County Council made to the different municipalities which are provided for in the by-law:—

MUNICIPALITY.	ROLL SETTL'D BY COUNTY COUNCIL.	ROLL SETTL'D BY Co. COURT JUDGE.	SUMS GRANTED BY BY-LAW
			BY Co. Cou'IL.
Barrie .....	\$25,000	\$25,000	\$ 50
Bedford .....	84,000	84,000	168
Clarendon and Miller .....	28,000	28,000	56
Garden Island .....	65,000	60,000	.....
Hinchinbrooke .....	73,000	73,000	146
Howe Island .....	50,000	50,000	100
Kennebec .....	32,000	32,000	64
Kingston .....	770,000	770,000	1250
Loughborough .....	272,000	272,000	538
Olden .....	45,000	45,000	90
Oso .....	30,000	30,000	60
Palmerston and Canonto .....	28,000	28,000	56
Pittsburgh .....	500,000	400,000	.....
Portland .....	349,000	349,000	698
Portsmouth .....	78,000	100,000	376
Storrington .....	350,000	380,000	1000
Wolfe Island .....	320,000	320,000	640
	\$3,099,000	\$3,046,000	\$5562



The applicant, who was reeve of the township of Pittsburgh, made affidavit that he was a resident of the township of Pittsburgh and a ratepayer therein: that he was present in the council when the by-law was passed, and he opposed and voted against it: that from the language then used in the council by the supporters of the by-law, and from the by-law itself, he has reason to believe and does believe that the object in passing the by-law was to recoup the municipalities of the county which had been affected by the County Judge's decision on appeal against the equalization of the rolls by the county council: that the townships of Pittsburgh and Garden Island, whose assessments were reduced by the Judge, are omitted from the benefits of the by-law: that the deponent is not aware of any roads or bridges assumed by the county council except the York road, which is a toll road and pays a revenue after expenses; and that road runs through the township of Kingston only so far as it lies in the county of Frontenac, and is repaired by the county from its returns; and that he is not aware of any road or bridge then projected or mentioned in the opening or making of which the county at large is sufficiently interested to justify assistance from the county funds; nor is he aware of any petition asking for such assistance to any particular road or bridge, and nothing was said at the time of the passing of the by-law about such road or bridge, or about any road or bridge in particular.

*Devlin Dexter Calvin*, reeve of the township of Garden Island, made a similar affidavit.

The applicant also made affidavit that he was chairman of the finance committee of the county council; that the annual county rate was usually struck and imposed at the June session of the council, and that it was so struck and imposed in the year 1876: that in the rate no provision was made for the proposed expenditure under the by-law in question, but a former grant by the council at its January session in the said year for roads and bridges was provided for in the said rate: that the proposed expendi-

ture under the said by-law could not be provided for without a vote unless by diverting funds from their proper and legitimate purpose, and without reference to this expenditure; and if it be not made at all there would probably be a deficiency in the county finances in the year 1876.

Mr. *Elkington*, the clerk of the county council, was examined under the statute, and among other things stated that at a session of the county council, when twelve members of the council were present, held at the Albion Hotel (probably by reason of the destruction of the court-house by fire), the question of the grants to the local municipalities was discussed, and Mr. Watkins, the chairman of the equalization committee, handed the deponent certain figures to be inserted in the by-law proposed to be introduced into the council. "The figures handed me were an equivalent to what was taken off Pittsburgh and Garden Island, divided among the other townships in proportion to their assessments." "I heard 'a fifth' mentioned at the meeting at the Albion Hotel. I understood it to refer to the equalization of these grants. The rate struck in June was sufficient to cover the estimate made by the treasurer and the finance committee. The grants made by the by-law in question were not included in the estimate on which the rate was struck in June."

The affidavits for the defendants were to the following effect:—

*John McRorey*, the warden of the county in 1876, said he had been a member of the county council for more than seven years: that the aggregate equalized assessment of the county for 1876, on which the rate in June was struck, was \$3,099,000, and the rate was made for raising \$30,990 for the year's current expenses of the county: that for the last seven years the council had received from various sources, other than through county rates or taxes, several thousand dollars, which he called surplus, or non-county funds, they not being considered in the year's estimates.

The Council were of opinion that they had a discretion-

any control over their surplus, or non-county moneys, so that they were best applied for the general good of the county, and during several years, when they deemed the roads not in sufficient repair, they donated therefrom certain sums to the local municipalities to assist in making such repairs, and the by-law in question was passed with that view.

The township of Pittsburg is bounded on the south by the river St. Lawrence and on the west and north by the Cataraqui River and Rideau Canal, and on the east by the county of Leeds, and it has three macadamized roads running the whole way through the same from east to west. Garden Island is a small municipality containing about thirty acres, wholly surrounded by navigable waters and requires no road communications. The said rivers, canal, and macadamized roads afford ample communication for the township of Pittsburgh, and far superior to those of any other township in the county. And he believed the grants made by the by-law were equitable and for the best interests of the county, and the mode fixed by the by-law for the laying out the moneys was with a view to economy and the public advantage. Mr. Toland, who was warden of the county in 1875, made a similar affidavit.

*William Craig*, a clerk in the office of the attorney of the county council, said he had searched through the minutes, by-laws and committee reports of the council, and he found that the county council had for many years past made grants from their surplus moneys to the local municipalities similar to those made by by-law No. 138: that in the year 1867, when the applicant was a member, the county council granted, and the applicant voted for the same, \$550 to the different townships for the improvement of roads, specifying the townships: that in 1869 the county granted \$1,500 for the like purpose, and the applicant was then a member of the council and voted for the grant: that in 1870 the county granted \$1,800 for the like purpose, and the applicant was a member of the council and sup-

ported the grant: that at another time the county granted \$1,650 for the like purpose, and the applicant, being a member of the council, supported the grant: and that in January, 1876, the applicant moved that \$50 be granted to each municipality north of Portland and Loughborough.

*Mr. Snooks*, the solicitor of the defendants, said that while the grants in the by-law in question amounted to \$5,562, the surplus moneys in the present year, over and above that required for the current year's expenditures, were more than double the amount of the grants. Some of the sources from which such surplus was derived were old claims for jury expenses recovered by the county from the city of Kingston; a sum of about \$8,000 recovered from William Ferguson; the excess of rates by what is called "the altered state of things"; and a claim which the county was preferring against the city of Kingston for a moiety of the cost of building and maintaining the court house. And the deponent said he believed the grants in question "were made out of such trust funds, not county funds, and the council deeming the same applicable for such purposes at their discretion."

*Mr. Elkington* also made an affidavit, but it added nothing material to the facts before stated.

In Michaelmas term, November 28, 1876, before Wilson, J., sitting for the full Court, *Bethune*, Q. C., shewed cause. The by-law, it is said, is *ultra vires*, because it is alleged to have been passed for the purpose of compensating the municipalities which it is said were injured by the equalization made by the Judge of the County Court who on appeal altered the equalization which the county council had made. It is said to be a device by the county council to alter and correct by this indirect method the decision of the Judge, which they cannot directly question or impeach. And it is said that the by-law shews upon its face that such was the intention of the council, because the only two municipalities which had a reduction made in their equalized assessment, or were benefited on appeal by



the Judge, are the only two municipalities which are not benefited by the by-law. There are affidavits made shewing that the county council has in former years passed by-laws for the like purpose as the one now complained of, which shews that the by-law was passed in good faith and for the very purpose which it expresses, namely, to aid the municipalities which are provided for. The affidavits shew also that neither Pittsburgh nor Garden Island required any aid for their roads or bridges. The charge of *mala fides* is completely answered. As to the other part of the charge of *ultra vires*—that the county council had no power to grant aid to nearly all the municipalities in the county, as they have done by the by-law, but that they should either have specified the roads and bridges on which the expenditures were to be made, or that they should have shewn that they were sufficiently interested in the work to justify the outlay—see the Municipal Act, 1873, secs. 411, 429, 440, sub-sec. 4—the county has constituted the councils of the respective municipalities to which money has been granted their agents and commissioners, to lay out the money granted according to their discretion. There is no express power in the statute authorizing the county to make such a grant, but there must be an implied leave to do so. It appears upon the affidavits filed that the county had surplus funds in hand, not applicable to any particular purpose, and that the grant in question was made from these funds, as grants had been in former years, without any objection to such appropriations. The surplus funds on hand dispenses with the necessity of making any special rate, or altering the rate which was struck for the year 1876 before the passing of the by-law.

*MacLennan*, Q. C., in support of the rule. It is admitted there is no express power in the county council to make such grants as they have provided for in this by-law, and it can be shewn by a reference to the statute that there is no implied power. The statute is more specific in its requirements, and in the manner in which it authorizes the powers it confers to be exercised by these different

bodies. There is here an arbitrary disposition of the county funds, based on no proper ground, and by which fifteen out of seventeen municipalities receive grants for their roads and bridges in general, to expend when and where they like, for the benefit of the residents of these localities, and not for the general good of the county. No such power as that can be implied from any of the enactments of the statute. If the county spend money on roads or bridges in any municipality the council must assume it: Municipal Act, 1873, ch. 48, sec. 410. Section 411 applies to township or county boundary lines only. Section 412 provides in what way the county shall proceed when it assumes a road or bridge, and an express obligation is cast upon the county by section 413. The claim insisted upon here is, that the county may grant away its funds for purposes which are not within their control, nor for their benefit. They have in the application and expenditure of these moneys delegated their powers to others, which they are not permitted to do. The answer that the county has made grants of the like nature in former years may be used as an argument to shew *bona fides* on their part in the passing of the present by-law, but it is an argument only. The fact of *bona fides* is denied. It is sufficient for the applicant to shew that, notwithstanding their previous grants, there is no power in the county council to make them. Then it is said these are not county funds, that they are surplus moneys. That cannot be maintained. They are county moneys, and as such must be dealt with the same as any other of the county property, for the legitimate purposes of the county. Section 429 does not apply here, and sec. 440, sub-sec. 4, shews the circumstances under which the council may properly grant assistance to local municipalities. It must be for a *new* road or bridge, and it must be in a case where the county at large is sufficiently interested in it to justify the assistance. Neither of these grounds of justification can be maintained in this case. But the facts shew that the by-law was passed for a different object than the one

which has been put forward : that it was done to set aside the County Judge's correction of the assessment rolls. The inference is, that the two townships which were not benefited by the by-law, were excluded from it, because they had got a corresponding advantage by the Judge's alteration of the roll.

March 2, 1877. WILSON, J.—I have no doubt the county council has in different past years passed by-laws similar to the one in question, and for the like purpose, to aid the local municipalities in the making and repair of their roads and bridges.

But while that may shew their *bona fides* in passing this by-law, it will not justify their exercise of such a power, if in fact they do not and never did possess it.

The by-law recites that the county council deems it expedient to grant the sums in question to the municipalities "to aid them in preserving, improving, and repairing roads and bridges therein;" and it directs that the moneys so granted, "shall be expended by the respective local municipalities where required, as they deem expedient, for the benefit of the public of said county."

Sec. 410 of the Municipal Act of 1873 applies (1) to roads and bridges within any township which the county council by by-law assumes; (2) and to bridges across streams separating two townships in the county; (3) and to bridges crossing rivers over 100 feet in width in any incorporated village, &c.; (4) and to roads or bridges dividing different townships.

Sec. 411 applies to township or county boundary lines which the county assumes.

Sec. 412 declares what the county council shall do when it assumes by by-law any road or bridge.

Sec. 413 has no application here.

Sec. 429 applies to aid being granted to an *adjoining* municipality in making, &c., any highway, bridge, or communication passing from or through an *adjoining* municipality.

Sec. 440, provides for aid being granted by the county to any town, township, or incorporated village, by loan or otherwise, towards opening or making any *new* road or bridge in the town, township, or village, "in cases where the council deems the county at large sufficiently interested in the works to justify such assistance, but not sufficiently interested to justify the council in at once assuming the same as a county work."

There is nothing in any of these enactments, nor in any others which I have looked at, which can justify the county council in using the county funds, in which every municipality of the county is interested, by appropriations to the municipalities of the county in "preserving, improving, and repairing roads and bridges" (which are the words of this by-law) in their municipalities; which roads and bridges the council have not assumed and have not pretended to assume, and which they cannot assume, because the grant is not for any particular road or roads, bridge or bridges, in these respective municipalities, but for *all* the roads and bridges which are in these localities; and which besides are not *new* roads or bridges, and it is not pretended that they are so; and in which the county at large is not sufficiently interested to justify the assistance, nor is it pretended that it is.

The by-law is plainly in excess of the power of the county council.

The assertion that the funds from which the grant is made, are not county funds, because they are surplus funds, or because they are the proceeds of certain old debts or claims, or the excess of some rates, is very singular and contradictory. If they were not county funds, how or why did the county get them?

The county is a body aggregate representing certain persons and bodies, and everything which it has and gets belongs to it for the benefit of the persons or bodies which constitute it.

It can be of no consequence from what source the fund comes, whether by the collection of an old debt, or a gift. When once it is received it is a county asset, and must be



dealt with precisely as if the like sum had been raised by assessment and levy upon the inhabitants of the county.

This by-law shews no justifiable appropriation of the county funds under any authority express or implied. On the contrary, it shews a misapplication of them in direct violation of the statute, and usage will not sanction it. It calls rather for a special intervention to put a stop to so unwarranted an assumption of power.

I am not convinced that the by-law was passed for the mere purpose of aiding the local bodies in the repair of their roads and bridges, however unauthorized that may have been or may be. It had relation in some way to the equalization made by the county council, and which the County Judge interfered with by reducing the assessments of Pittsburg and Garden Islands, and by increasing those of Portsmouth and Storrington, and the purpose was to deprive the two municipalities of any share in the grants under the by-law whose assessments had been reduced, and to make up to those municipalities for the amounts which had been added by the Judge to their assessments. It will be seen how that is managed. Barrie, for instance, was allowed by the county council at \$25,000, and the Judge allowed that to remain as it was. The grant by the by-law to Barrie is \$50. That is \$2 for every thousand dollars of its assessments, or \$50. And so with all the others whose assessments the Judge had not altered. But as to Portsmouth and Storrington, the two whose assessments the Judge increased, they are provided for by the by-law as follows :

Portsmouth was equalized by the council at \$78,000, and by the Judge at \$100,000 ; the grant to it by the by-law is \$376.

That sum is made up as follows :

The \$2 on every thousand of the county equalization of.....	\$78,000	\$156 00
Assessment increased by the Judge .....	22,000	
One cent upon the \$ equal to .....		220 00
		<hr/>
		\$376 00

Storrington is dealt with in like manner. The one cent on the dollar is allowed on the \$22,000 added as above, because that was the county rate on the aggregate assessment as equalized by the county council.

The county equalization was, as before stated, \$3,099,000, and the county rate was \$30,990, or 1c. on the \$; and so just exactly the sum the Judge put on against Portsmouth and Storrington, the county council by the by-law gave to them by way of grant.

And if it had been necessary, I should have given relief against such an abuse of power. It is not seemly that such a body as a county council should scheme to evade and over-rule the law; and it would have been better, in the face of these obvious facts, if the affidavits had not been so impregnated with assertions that the by-law was equitable and for the best interests of the county.

I make the rule absolute to quash the by-law, with costs.

*Rule absolute.*

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CAWTHRA ET AL. V. THE HAMILTON AND NORTH-WESTERN  
RAILWAY COMPANY.

*R. W. Co.—Compensation for land taken—Action on award—Tender of conveyance—Title.*

A land owner to whom compensation has been awarded for land taken by a railway company, under the Railway Act, Consol. Stat. C. 66, cannot sue upon the award before tendering a conveyance of the land. A plea to such an action, that no such conveyance had been executed or tendered, was therefore held good.

Defendants also pleaded, on equitable grounds, that after the award they tendered the sum awarded to S., (with whom the arbitration had been had,) who then appeared to be the owner in fee simple of the land according to the registered title: that he refused to receive it; that the defendants had since received notice that S. had not a good title, and that the plaintiffs (his executors) were not entitled to the sum awarded; and that defendants had always been ready to pay the said sum on receiving a good and sufficient conveyance of the land. *Held*, a bad plea, there being no averment that S. had not in fact a good title, nor that they had paid the money into Court under the Statute, nor that they now bring it into Court.

DEMURRER. Declaration, by executors of the Hon. Samuel Mills, against the Hamilton and North-Western R. W. Co., for that the Hamilton and Lake Erie R. W. Co., in the lifetime of the said testator, having taken and entered into possession of certain lands of the said testator, specified in the award hereinafter mentioned, for the purposes of their railway, in pursuance of the Railway Act and of the special Act incorporating the said company, and having given the necessary notice provided by the said statutes in that behalf to said testator, and having tendered a certain sum of money to the said testator as and for compensation to him in respect of the matters referred to in the said award, and the said testator having refused to accept such sum of money so tendered, and the said testator not having within the time prescribed by the said statutes in that behalf, pursuant to the requirements of the said notice given him by the said company, notified to the said company the name of a person to act as arbitrator on his behalf in respect of the said matters, the Judge of the County Court of the county of Wentworth, in which county the said

lands were and are situated, in accordance with the provisions of the said statutes, upon the application of the said company, duly appointed a sworn surveyor for Ontario, to wit, one Orpheus Robinson, to be the sole arbitrator for determining the compensation to be paid to the said testator for the said lands, and for damages under the said Acts ; and the said Orpheus Robinson having taken upon himself the burthen of the said reference, and having been first duly sworn before a justice of the peace for the said county, such proceedings were thereupon regularly had, that thereafter, to wit, on the 19th day of April, in the year 1873, the said arbitrator duly made his award in writing, under his hand and seal, in respect of the premises, and thereby awarded and directed that the said company should pay to the said testator, in the manner provided by the said statutes in that behalf, the sum of \$1,600 for the said lands so taken by the said company, and specified in the said award, and for all damages sustained by reason of the exercise of the powers of the said railway company with respect to the said lands, which were the matters referred to the said arbitrator. And the plaintiffs aver that after the making and publishing of the said award, and before the commencement of this suit, the said Hamilton and Lake Erie R. W. Co., under and by virtue of the powers conferred in two certain Acts of the Legislature of the Province of Ontario, passed in the 38th and 39th years respectively of her Majesty Queen Victoria, and chartered respectively 48 and 72, duly became amalgamated and incorporated with the defendants ; and it was by the said statutes enacted that the defendants, upon such amalgamation, should be responsible for and become liable to pay and discharge under the terms thereof the debts, obligations and liabilities of the said Hamilton and Lake Erie R. W. Co., whereby, and under and by virtue of the said award, the said defendants became and were and are liable to pay to the plaintiffs, as executors of the said testator, who departed this life since the making and [publishing of the said award, the said sum so awarded, with interest from



the date of the taking possession of the said lands by the said the Hamilton and Lake Erie R. W. Co.. And all conditions were fulfilled, and all things happened, and all times elapsed necessary to entitle the plaintiffs, as such executors aforesaid, to be paid the said sum of \$1,600 with interest, as aforesaid, yet the defendants have wholly neglected and refused, and still neglect and refuse, to pay the same to the plaintiffs as such executors aforesaid.

Common counts were added : for money payable to defendants, as executors, for money awarded, &c., and for interest, &c.

Third plea to the first count: that the said testator did not, nor did the plaintiffs, before the commencement of this suit, make, execute, deliver, or tender to the defendants, or to the said Hamilton and Lake Erie R. W. Co. any deed or conveyance of the lands in respect of which the said alleged award was made.

Sixth plea, to the common count: that the lands and the alleged award and reference therein mentioned are the same lands, and the same award and reference in the first count mentioned, and the money claimed under the said alleged award in the said second count mentioned, and alleged causes of action in respect thereof, are one and the same as in the first count mentioned. And the defendants further say that the said Hon. Samuel Mills did not, nor did the plaintiffs before the commencement of this suit, make, execute, deliver, or tender to them, or to the said Hamilton and Lake Erie R. W. Co. any deed or conveyance of the lands in respect to which the said alleged award was made.

Ninth plea, on equitable grounds, to the said first and second counts: that the lands and the alleged award and reference, and the moneys claimed, and the alleged causes of action in both said counts are one and the same. And the defendants say that immediately after the making of the said alleged award by the said Orpheus Robinson to wit, on the 28th day of April, 1873, the Hamilton and Lake Erie R. W. Co. tendered the sum so awarded, in legal cur-

rency, to the said the Hon. Samuel Mills, the said the Hon. Samuel Mills at that time appearing to be the owner in fee simple of the said lands, according to the registered title of the said lands in the registry office of the county of Wentworth, the title to the said lands then being a registered title, but the said the Hon. Samuel Mills thereupon refused and declined to accept the same. And the defendants further say that in and by the said award the said sum of \$1,600 was awarded to be paid in the manner provided by the said Railway Act, and is to be the full value of the fee simple of the said lands, and that the defendants have since such tender as aforesaid received notice that the said the Hon. Samuel Mills had not at the time of the said award and reference, nor had the plaintiffs before the commencement of this suit, a good title to the said lands, or any part thereof, or any right or power to sell and convey the same to the defendants, and that the plaintiffs are not the persons entitled to receive the said sum so awarded, or the value of the said lands. And the defendants say that they have at all times since the making of the said award been ready and willing to pay the said sum so awarded upon receiving a good and sufficient conveyance to themselves of the said lands.

Demurrer to 3rd and 6th pleas, on the grounds: that by the declaration it is alleged that the defendants are in the possession of the said lands, and that an award was made in the premises, which has in effect and by law vested the title in the said lands in the defendants; that the right of action upon the said award is not suspended or in abeyance until a tender of such conveyance is made; that it is no part of the duty of the plaintiffs whose land is taken by ex-appropriation, and not by contract, to tender a conveyance.

Demurrer to the 9th plea, on the grounds: that it does appear thereby that the plaintiffs have not the title in fee simple to the said lands: that the defendants do not shew that having reason to doubt the state of the title they had paid the amount of the said award into Court, under

the provisions of the Railway Act: that it is no part of the plaintiffs' duty to tender a good and sufficient conveyance of the lands before bringing this action: that the said plea discloses no equity whereby the plaintiffs' claim should be defeated, nor does it confess nor deny the cause of action.

May 1, 1877. *J. White* for the demurrer. A purchaser is bound to tender a conveyance: *Hoggs v. Kent*, 3 East 510; and it is for the railway to tender one. He also referred to *Poole v. Hill*, 6 M. & W. 835. There is no averment that the testator did not offer a conveyance.

*Walker*, contra, cited *Mitchell v. Great Western R. W. Co.*, 35 U. C. R. 158; *Laird v. Pim*, 7 M. & W. 474; *Guardians of East London Union v. Metropolitan R. W. Co.*, L. R. 4 Ex. 309; *Fisher's Dig.* 7560.

May 8, 1877. HAGARTY, C. J. C. P.—This company's Act, 35 Vic. ch. 55., sec. 2, incorporates the land clauses of the Consolidated Canadian Railway Act, Consol. Stat. C. ch. 66.

The compensation here claimed was awarded by a sole arbitrator, the testator refusing the sum tendered by the defendants as compensation. The land taken is described in the award, and \$1,600 awarded therefor. The defendants are in possession.

Section 11, sub-sec. 20, allows possession to be taken on payment or legal tender of the sum awarded or agreed upon, or on deposit thereof as provided. Sub-section 22 enacts that the compensation shall stand in the stead of the land; and sub-section 23, that if the party to whom compensation is payable refuse to execute a conveyance, &c., the company *may* pay the compensation into the office of a Superior Court, with six months' interest, and may deliver to the clerk an authentic copy of the conveyance, or of award or agreement, &c., and the award or agreement shall be deemed to be the title of the company.

The land clauses in the Great Western Railway Act, 16 Vic. ch. 99, sec. 5, *et seq.*, do not differ in substance from

these clauses, so far as the questions arising on this record are affected.

Section 6 directs that the company shall, as soon as may be after making tender of compensation, if the sum be not accepted, pay the amount into Court. They may then take possession.

Section 7 directs the compensation agreed on or awarded shall stand instead of the land, &c.

In *Mitchell v. Great Western R. W. Co.* 35 U. C. R. 158, this point now before us was not directly in issue. Wilson, J., who gives the judgment of the Court says: "I may say that 16 Vic. ch. 99, sec. 7, does not dispense with the necessity of a proper conveyance and warranty, if the company require it, being made to the company before the money can be demanded."

In the notes to that case an elaborate judgment of the same learned Judge is given on a previous argument of the same case. He there notes that the notice and subsequent fixing the compensation by arbitration constitute a contract for sale and purchase, which the Court will enforce at the suit of the vendor, citing *Mason v. Stokes Bay Pier & R. W. Co.*, 32 L. J. Ch. 110. And again, "The company, after the award made for the price, cannot be sued for the money until a conveyance has been executed to them," citing *Guardians of East London Union v. Metropolitan R. W. Co.*, L. R. 4 Ex. 309.

In this latter case the declaration was on a statutory award under the Land Clauses Act (1845), fixing compensation for land taken. Plea: that the plaintiffs have not executed any conveyance of the premises to the defendants. Demurrer.

It was urged for the plaintiff that such a case differed from an ordinary sale, and that execution of conveyance was not a condition precedent to the right to the money: that the company if they pleased could deposit the money and execute a conveyance to themselves under 8 & 9 Vic. ch. 18, sec. 77. Defendants argued that it would be absurd that defendants should be compelled to pay for land which they



had not got, and to which plaintiffs might not be able to make title, that the Act would not help, and that the common rule applied, that before requiring payment of the price of anything sold the property in the thing must be transferred; until transfer the remedy was only in damages for breach of contract.

The Court (Bramwell, Channell, and Cleasby, BB.,) held that the rule laid down in *Laird v. Pim*, 7 M. & W. 474, applied to the case of a purchase under statutory powers, and decided that the plea was good.

The report in 38 L. J. N. S. Ex. 225, is equally meagre, but adds that the plea also stated that the defendants had not taken possession of the lands. *Wing v. Tottenham and Hampstead Junction R. W. Co.*, L. R. 3 Ch. 740, was cited. There Lord Hatherley comments on the clause in the Act. The effect of the judgment seems to be, that a vendor has as against a railway company generally the same remedies and lien as an ordinary vendor.

Sections 75 and 76 of the Imperial Act 8 & 9 Vic. ch. 18, point out very clearly the course to be taken after award. The money is to be deposited in a bank, and the owner shall, when required, duly convey the land. On default, or if he fail to deduce a good title, the company may execute a deed poll, reciting all the facts, which shall vest the land in them.

Section 76: If on tender of amount the owner refuse to accept, or fail to make title, or refuse to convey, the company may deposit the amount as directed.

Section 77: A deed poll may then be executed, which shall vest the land in them, &c.

On the whole it seems to me that the plea is good, and that the plaintiffs cannot recover the whole sum awarded if no deed has been ever executed, made or tendered, as is averred. The owner, as Lord Hatherley observes, does not lose his remedy for his land, and where the compensation has not been paid into Court or tendered to him, he has of course the ordinary remedies of an unpaid vendor. If he sue for the money he must either convey or offer so to do so as to pass his interest in the land. Without this, in an

ordinary case between individuals, he can only recover damages for breach of contract. See *Laird v. Pim*, 7 M. & W. 474.

The case cited in L. R. 4 Ex. 309, expressly holds the law of *Laird v. Pim* to govern. It is true that here the defendants have taken possession, and they had not done so in the Exchequer case. But I suppose the answer here is, that as the defendants have not paid the compensation either into Court or otherwise, they cannot claim the protection of our statutes, which declare that the compensation shall stand in the stead of the land.

I must hold the third and sixth pleas to be good answers to a claim for the sum awarded.

As to the ninth plea. It amounts to this, that after the making of the award the defendants tendered the sum awarded to the testator, who appeared to be the owner in fee simple, according to the registry, but he refused to accept it: that since the tender, they have been notified by some one that the testator had not a good title, and that since then, they have been always ready and willing to pay the sum awarded on receiving a good and sufficient conveyance of the land. There is no averment that the testator had not in fact a good title, nor that the defendants have paid the money into Court under the statute, or that they now bring it into Court for the plaintiffs. Unless, therefore, we hold that a tender of the amount before action and a refusal is by itself a good bar, the plea must fail.

Sub-sec. 20 allows possession to be taken of the land upon payment or legal tender of the compensation; and sub-sec. 23 provides that if the party to whom it is payable refuse to execute the proper conveyance and guarantee, &c., the defendants may pay the money into Court. No provision is made in our statutes for this particular case. The Imperial Act provides for it.

It has therefore to be decided on general principles. I think the tender by itself not a good bar, and that the defendants must either deposit the money under the statute or bring it into Court, as in an ordinary case of tender.

I think this ninth plea bad.

Judgment for the defendants on third and sixth pleas, and for plaintiff on the ninth plea.

*Rule accordingly.*

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IN THE MATTER OF THE CANADA SOUTHERN RAILWAY  
AND DALLAS NORVALL, HENRY H. CUNNINGHAM,  
HENRY G. DUFF, AND WILLIAM H. GATFIELD.

*R. W. Co.—Award of compensation for land—Appeal against such award—  
38 Vic. ch. 15, O.*

Upon a petition under 38 Vic. ch. 15, O., for the review of awards made against a Railway Company for compensation for land taken, on the ground that the sums awarded were excessive, the evidence as to value being conflicting, the awards were upheld.

*Quære*, as to the admissibility of affidavits on such an application.

The intention of the statute was not to make the Judge appealed to a substitute for the arbitrators, or to permit him to reverse their finding as to amount on the weight of evidence merely, where a similar verdict could not be set aside for excessive damages. Some misconduct, legal or otherwise, or the disregard of some legal principle must be shewn.

One of the arbitrators, an old resident and well acquainted with the locality, protested against the waste of time involved in taking the evidence of many witnesses having much less knowledge of the value of the land than himself, and in the end, having received the evidence, refused to give up his own judgment to that of such witnesses. *Held*, that he could properly do so.

Where the company desired to take land, as authorized by sec. 129 of Consol. Stat. C. ch. 66, for an extension across three lots of their original line, which was in operation: *Held*, that the arbitrators were not required to take into consideration the additional value conferred on such land by the original construction of the railway. The intention of the Act is, that when the act proposed to be done, whether original construction or proposed deviation, gives increased value to the land, the owners must allow for such increase.

THIS was a petition by the Canada Southern Railway Company for review of awards made against the company as compensation for lands taken by them from Norvall and others for the purposes of the Canada Southern Railway.

The railway company was incorporated by 31 Vic. ch. 14, O., under the name of the Erie and Niagara Extension

Railway Company. This Act was amended and the name of the petitioners changed by 33 Vic. ch. 32, O. These Acts were further amended by 35 Vic. ch. 48, O., 36 Vic. ch. 86, O., and by 37 Vic. ch. 68, D., and 38 Vic. ch. 66, D.

The petitioners were empowered to construct a line of railway from a point in the township of Bertie, at or near the village of Fort Erie, to some point in or near the town of Amhertsburgh.

The line was constructed to the Detroit River, at or near the town of Amhertsburgh, and is being worked.

Afterwards it became necessary for the petitioners to change the location of the line at Amhertsburgh, in order to provide against obstructions caused by ice in the Detroit river to the boats employed by the petitioners for the carriage of the railway cars across the river.

In changing the location of the line it was found necessary to carry the line of railway across parts of lots 9, 10, and 11, in the first concession of the township of Anderdon, owned by the respondents Norvall, Cunningham, Duff, and Gatfield respectively.

A plan of the railway and book of reference were duly deposited, and due notice given, in compliance with the provisions of the Railway Act in that behalf.

The portion of land owned by Norvall was  $2\frac{2}{10}\frac{9}{0}$  acres, and had a frontage of 660 feet along the Detroit river.

Cunningham's portion was  $1\frac{3}{0}\frac{8}{0}$  parts of an acre, and had a frontage of 248 feet along the river.

Duff's portion was  $1\frac{3}{0}\frac{1}{0}$  parts of an acre, and had a frontage of 250 feet along the river.

Gatfield's portion was  $1\frac{1}{0}\frac{4}{0}$  parts of an acre and had a frontage of 168 feet along the river.

The petitioners, being unable to make any agreement with these owners, on the 8th of October, 1875, served them with a notice to arbitrate, and named Judge Kingsmill as arbitrator for the company.

This notice was, as the statute requires, accompanied by certificates of value by a sworn surveyor on behalf of the company.



The owners refused to accept the prices offered, and refused to give possession of the land.

Application was thereupon made by the company to the County Judge, and he granted the usual warrant for possession, provided the company gave security to his satisfaction for the compensation to be awarded under the Railway Act.

Arthur Rankin, Esq., of Sandwich, a Provincial Land Surveyor, and a well-known resident in the western part of the Province, was appointed as arbitrator on behalf of the owners.

Messrs. Kingsmill and Rankin were unable to agree as to the third arbitrator, and the County Judge appointed Alexander Wilkinson, Esq., of the town of Sandwich, also a Provincial Land Surveyor.

The three arbitrators on 7th March, 1876, met at the town of Amherstsbury, and were nearly a fortnight taking evidence as to the value of the pieces of land in question.

The evidence as to value was very conflicting. There were several witnesses called on behalf of the owners, who valued the land at from \$15 to \$20 per foot frontage on the river Detroit, whereas many witnesses called on the part of the company placed a very much less value upon it, and ridiculed the idea of valuing land in such a situation by the foot frontage. On 21st March, 1876, Wilkinson and Rankin, two of the arbitrators (the third refusing to join) made their award as follows :

To Norvall .....	\$7,260
“ Cunningham .....	2,480
“ Duff.....	2,500
“ Gatfield .....	1,680

The arbitrators who made the award agreed that the land was worth at least \$10 per foot frontage, and as Norvall's property was of greater depth than that of the others, and he was the owner of a dock, for the greater depth, as well as the inconvenience he would be put to in reaching his dock, they allowed him \$1 additional upon his frontage of 660 feet.

In this manner the amount of the award was, according to the affidavits filed, arrived at by the two arbitrators. The third arbitrator, although willing to award much more than the amounts offered by the company, would not agree to anything like the amounts awarded.

It was contended that the awards were not supported by the evidence: that the arbitrators awarded the damages on an erroneous principle: that the conduct of Mr. Rankin was partial: that the arbitrators took into consideration the great value of the land to the company, and refused to take into consideration the increased value given to the lands by the original construction of the line of railway in their vicinity, and did not take into consideration the legal obligation of the company to provide crossings, &c.; and that the award was exorbitant and excessive.

These grounds were supported by the affidavit of the third arbitrator, who refused to join in the award, and by the affidavits of other persons who were present during the arbitration.

In answer there were filed the affidavits of the two arbitrators who made the award, shewing the grounds for making the award, denying partiality on the part of Mr. Rankin, and explaining circumstances relied upon by the petitioners as indicating partiality on their part. They denied that any assessment was made in respect of the value and advantages of the land to the company.

All the evidence taken before the arbitrators was also produced.

February 2, 1877. *Crooks*, Q. C., and *Kingsmill*, for the appeal. This appeal is under 38 Vic. ch. 15, sec. 4, 5, 6, O., and is to be guided by the same practice as prevails in equity: See *Great Western R. W. Co. v. Warner*, 19 Grant 506. The arbitrators have gone outside of the principles laid down in equity: Consol. Stat. C. ch. 66, sec. 11, sub-sec. 4; *Duke of Buccleugh v. Metropolitan Board of Works*, L. R. 5 H. L. 418; *Widder v. The Buffalo and Lake Huron R. W. Co.*, 27 U. C. R. 425, 433; *Cummins v. Credit Valley R. W.*

Co., 21 Grant 162. See also *Rickett v. Metropolitan R. W. Co.*, L. R. 2 H. L. 175; *Hammersmith R. W. Co., v. Brand*, L. R. 4 H. L. 171; *Beckett v. Midland R. W. Co.*, L. R. 1 C. P. 241. Next, the arbitrators have allowed nothing for the set-off of benefit to the land from the original construction of the road as they should have done; 35 Vic. ch. 25, sec. 5, O.; 1 *Redfield on Railways*, 4th ed., p. 261, 262, 272, 273. The arbitrators have been wrong in assuming to value the lands by a frontage rate. On the evidence, the business of the proprietors of the land has been rather benefited than prejudicially affected by the construction of this portion of the road.

*Robinson, Q. C.*, and *O'Connor, Q. C.*, contra. The finding of the arbitrators on the weight of evidence should be given effect to. No objection can be raised because this is a deviation, because it is not, but only a continuation of the original line, *i.e.*, an extension. We cannot take into consideration the increased value of the land from the construction of the railway originally, for that was done years ago, and it is not shewn that the extension increases the value, but rather the contrary. They cited *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243; *Great Western R. W. Co. v. Baby*, 12 U. C. R. 106, 121, 131.

March 10, 1877. HARRISON, C. J.—The application is made under 38 Vic. ch. 15, O., intituled “An Act respecting Railway Arbitrations.”

Any party to such an arbitration may, within one month after receiving notice from one of the arbitrators of the making of the award, appeal therefrom *upon any question of law or fact* to a Judge of any of the Superior Courts of law or equity; and upon the hearing of such appeal such Judge shall, *if the same be a question of fact*, decide the same *upon the evidence*, as in the case of original jurisdiction: Sec. 4.

Provision is, by sec. 3 of the Act, made for the transmission of the evidence to the Clerk of records and writs of the Court of Chancery, for the use it is presumed of

the Judge on the appeal, although the Act does not declare in what manner access is to be had to it.

The right of appeal given by the Act is not to affect the existing law or practice as to setting aside awards: Sec. 6.

Where the application is to set aside an award, after the order of reference has been made a rule of Court, there is no difficulty whatever in the use of affidavits, but where the appeal is under 38 Vic. ch. 15, no provision is, in express language, made for the use of affidavits.

The language used is in this respect like that of the Act respecting new trials in criminal cases, which provided that the person convicted of crime "may apply for a new trial *upon any point of law or question of fact* in as ample a manner as any person may apply to the Superior Courts of common law in a civil action." Consol. Stat. U. C. ch. 113, sec. 1.

Both of the Superior Courts of law decided that this statute did not authorize the granting of a new trial on affidavits: *Regina v. Crozier*, 17 U. C. R. 275; *Regina v. Oxentine*, 17 U. C. R. 295; *Regina v. Beckwith*, 8 C. P. 274; *Regina v. Chubbs*, 14 C. P. 32; *Regina v. Hamilton*, 16 C. P. 340. And their decisions were sustained by the Court of Error and Appeal: *Regina v. Gray*, 1 E. & A. 501.

The Courts also held that where the verdict was sustained by the evidence given at the trial, it could not be set aside merely because the Court, on reading the evidence, differed in opinion, on a question of fact, from the jury who pronounced the verdict: *Regina v. Chubbs*, 14 C. P. 32; *Regina v. Jones*, 28 U. C. R. 416; *Regina v. Fick*, 16 C. P. 379; *Regina v. Seddons*, Ib. 389.

These decisions furnish some aid for the construction of the statute now before me.

They, if applicable, establish:—

1. That the appeal must be on the evidence adduced before the arbitrators.

2. That the finding of the arbitrators, if sustained by the evidence, ought not to be disturbed.



Mr. Robinson, as I understood him, argued that the question of the sufficiency of the evidence is the only question which can be brought before the Judge on appeal, and that on such an appeal there can be no adjudication as to any question of law. The Act gives the appeal, not only as to questions of fact, but as to "any question of law." This, I assume, means a question of law arising on the evidence, and to this extent, I am clear, questions of law may be raised and determined on appeals under the Act.

It appears to me, however, that so far as the present appeal can be said to rest on affidavits, these affidavits have been answered.

If the decision of the appeal were to turn on the question whether the affidavits are admissible or not, I should, if in my power, refer the parties to the full Court for its decision on the point.

So far as an appeal can be said to rest on the merits, even in an ordinary case of a motion to set aside an award as against evidence, when it appears that there was any evidence to sustain the finding, the Courts shew great disinclination to interfere: *Scobell v. Gilmour*, 5 U. C. R. 48; *Severn v. Cosgrave*, 2 U. C. L. J. N. S. 11; *Ross v. Bruce*, 21 C. P. 41, 548; *Dinn v. Blake*, L. R. 10 C. P. 388.

In speaking of awards like the one now moved against Sir John B. Robinson is reported, in *Commissioners of Public Works v. Daly, et al.*, 6 U. C. R. 33, 48, to have said:—"The award must be such as to shew clear misconduct and partiality; it must be outrageous before we could interfere merely on the ground that we think the arbitrators gave too much. It is their judgment, not ours, that is to determine the value of the property, and the extent of damages." And again in *Great Western Railway Co. v. Baby*, 12 U. C. R. 106, 118, the same learned Judge said:—"The ground of excessive damages is one upon which we could only act in extreme cases."

This agrees with the decisions in England, in cases where there is no dispute about the right to some compensation, and the only question is, as to the amount

of such compensation. See *Barber v. The Nottingham & Grantham R. W. Co.* 15 C. B. N. S. 726; See further, *Regina v. London & North Western R. W. Co.* 3 E. & B. 443; *Chapman v. Monmouthshire R. W. and Canal Co.*, 2 H. & N. 267; *Re Newbald and the Metropolitan R. W. Co.*, 1 C. B. N. S. 405; *Beckett v. Midland R. W. Co.*, L. R. 1 C. P., 241, 244, 246.

Such also is the rule in the United States. It is there held that when the proceedings of commissioners appointed to assess damages for the taking of railroad lands are regular, and there is nothing to shew that the commissioners erred in the principles upon which the valuation was made, their finding must be upheld: *Hannibal & St. Joseph R. W. Co.*, 49 Mo. 165, S. C., 1 Am. Railway Rep. 8.

Where the land sought to be taken by a railway company for right of way consisted of ten acres of land in the limits of a city, and twenty-five witnesses estimated the damages to the owner at various sums ranging from \$1800 to \$18000, an assessment putting the damages at \$5500 was held not to be so excessive as to make it the duty of the Court on that ground alone to set it aside: *Peoria & Rock Island R. W. Co. v. Birkett*, 7 Am. Railway Rep. 334.

In delivering judgment in the last mentioned case, Thornton, J., said: "The jury, under the circumstances, were the best judges of the value of the land, and we cannot perceive that so great injustice has been done as to authorize a disturbance of their finding. The character, credibility, and consistency of the witnesses, and their opportunities of knowledge could be better appreciated by the jury than the Court." *Ib.* 336-337.

It does not appear to me that the Legislature, in passing 38 Vic. ch. 15, O., intended the Judge to whom the appeal is made to be a substitute for the arbitrators, or to permit him to reverse their finding as to damages on a mere question of the weight of evidence.

If, however, it were made to appear from the amount of damages as compared with the evidence adduced before the

arbitrators, that the arbitrators must have acted under the influence of undue motives or some gross error or misconception, the Judge might, as in an ordinary case on a motion against a verdict for excessive damages, set aside the finding.

If it be shewn that the arbitrators were guilty of corruption, partiality, or misconduct, or where, without imputing actual corruption or partiality to the arbitrators, it appear that there was legal misconduct proceeding from the disregard of some legal principle made for their guidance, the Judge no doubt might set aside the award: *Great Western R. W. Co. v. Baby*, 12 U. C. R. 106; *Great Western R. W. Co. v. Hunt*, *Ib.* 124; *Great Western R. W. Co. v. Dougall*, *Ib.* 131; *Great Western R. W. Co. v. Dodds*, *Ib.* 133; *Re Miller and Great Western R. W. Co.*, 13 U. C. R. 582. See further, *Widder v. Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 222, 520; 27 U. C. R. 425.

Although it was urged that the conduct of Mr. Rankin, one of the arbitrators was partial, Mr. Crooks did not press it as a ground for setting aside the award, but sought in some manner to avail himself of it in support of the other ground on which he rested his attack against the award.

Mr. Rankin himself, as an old resident of the western part of the Province, had a knowledge of the value of the property, and, without excluding, protested against the waste of time in taking the evidence of many persons who had much less knowledge of the value than himself, and in the end, having received the evidence, refused to give up his own judgment to others who, in his opinion, had much less knowledge and experience than himself. All this he could do and properly do, according to the law laid down in *Widder v. Buffalo and Lake Huron R. W. Co.*, 27 U. C. R. 433. More than this he did not do. I do not see the slightest ground for impeaching his integrity, or for imputing partiality any more to him than to the arbitrator of the company. I cannot say that any one of

the arbitrators was partial. So far as I can judge from the evidence, all were conscientiously desirous of doing right and did right to the best of their ability.

All that remains is, the contention that the arbitrators who executed the award awarded the damages on an erroneous principle ; that they took into consideration the great value of the lands to the company ; that they refused to take into consideration the increased value given to the lands by the original construction of the line of railway in their vicinity, and refused to take into consideration the legal obligation of the company to provide crossings.

It is not clear from the evidence or the award that the arbitrators took into consideration the great value of the lands to the company, or refused to take into consideration either the increased value of the lands by the original construction of the line of railway, or refused to take into consideration the legal obligation of the company to provide crossings.

The affidavits filed in support of the petition are relied upon in support of these grounds of contention. If I am at liberty to refer to these affidavits on this application I am of course bound to refer to the affidavits in answer.

Mr. Rankin in his affidavit in answer says, that in coming to the conclusion as the amount of the award he was influenced by no other consideration than the consideration that the property taken was worth to its owners at least the amount awarded.

He, in a subsequent part of the same affidavit, referring to the property of Norvall, says, "as to taking into consideration the advantages and disadvantages resulting from the original location of the line of railway on the front part of the same property \* \* \* I regarded the advantages as counterbalanced by the disadvantages, and that they neutralized each other." He does not say how far, if at all, he took into consideration the advantages or disadvantages, if any, as to the remaining properties.

It is quite clear that if the arbitrators in estimating the value of the land were influenced by any consideration of



the value of the land to the railway company, instead of estimating merely the value of the interest of the owners, the awards can not be supported : *Stebbing v. The Metropolitan Board of Works*, L. R. 6 Q. B. 37. The value of the land is to be assessed on the principle of compensation to the owner. The question is not what the persons who take the land will gain by it, but what the person from whom it is taken will lose by it by having it taken from him.—Per Lush, J., *Ib.* 45.

While I am with the company on this point of law I am against them on the facts. I am satisfied that the arbitrators in making their award did not proceed on any such erroneous principle as suggested.

But while the law on this point is clear, the law on the other points raised is not equally clear. In order to dispose of them I must refer to the statute and to some of the leading cases applicable to its construction.

The conveyance of lands to railway companies and the valuation of the lands is regulated by sec. 11 of Consol. Stat. C. ch. 66, which is substantially taken from sec. 68 of the English Lands Clauses Consolidated Act of 1845.

After one month from the deposit of the map, &c., application may be made to the owners of the land, &c., which may suffer damage, &c., from the exercise of the powers, &c., and thereupon agreements may be made with such parties, &c., “touching the said lands or the compensation to be paid for the same or for the damages,” &c.—Sub-sec. 5.

Provision is made for service on the owner of land of a notice containing a description of the lands to be taken, &c., a declaration to pay some certain sum as “compensation for such lands,” &c., naming a person as arbitrator for the company, if the offer be not accepted ; and this notice is to be accompanied by the certificate of a disinterested sworn surveyor to the effect that he knows the land, &c., and that the sum offered is in his opinion “a fair compensation” for the land, &c.—Sub-sec. 7.

Provision is also made for the appointment of an arbitra-

tor on behalf of the company and of a third arbitrator.—Sub-secs. 8, 9, 10.

The arbitrators, or any two of them, or the sole arbitrator, being sworn, &c., faithfully and impartially to perform the duties of their office shall proceed to ascertain "*the said compensation*" in such way as they, he, or a majority of them deem best, &c.—Sub-sec. 11.

No such award is to be invalidated from any want of form or other technical objection if the requirements of this Act have been complied with, and if the award state clearly the sum awarded, and the lands or other property, right or thing for which "such sum is to be compensation."—Sub-sec. 19.

The "compensation" for any lands which might be taken without the consent of the proprietor is to stand in the stead of the lands. Sub-sec. 22.

The duty of the arbitrators is to award compensation for the land, this compensation to be a "fair compensation," and is to be ascertained "in such way" as the arbitrators deem best, provided they observe the principles of the Act.

A subsequent section enacts that any railway company desirous at any time to change the location of its line in any particular part, for the purpose of lessening a curve, reducing a gradient, or otherwise benefiting such line of railway, or for any other purpose of public advantage, may make such change, and that all and every the clauses of the Act shall refer as fully to *the part of any such line of railway*, so at any time changed, or proposed to be changed, as the *original line*. Sec. 129.

It was argued by Mr. Robinson that what was done by the company was not so much to cause a deviation of the line of railway as an extension of the line beyond the line of railway mentioned in the Act incorporating the company—sec. 129—but I do not agree with him in this contention. Nor do I agree with Mr. Kingsmill in his contention that the deviation is one under sec. 10, sub-sec. 11 of the Act, in the course of the original construction of the work. It was, I think, a deviation under sec. 129 which I have quoted.

The original Act does not profess to lay down the principles which should govern the arbitrators in the discharge of the duties imposed on them, but an amending statute of the Province of Ontario declares that the arbitrators, in deciding on such value or compensation, are authorized and required to take into consideration the increased value that would be given to the lands or ground through or over which the railway will pass, by reason of the passage of the railway through or over the same, or by reason of the construction of the railway, and to set off the increased value that will attach to the said lands or grounds against the inconvenience, loss or damage that might be suffered or sustained by reason of the company taking possession or using the said lands or grounds: 35 Vic. ch. 25, sec. 5, O.

Reading this amendment in connection with sections 11 and 129 of the previous Act, and in the absence of any decision bearing on the point, I would think that what is intended is, that where a line of railway is about to be constructed, or where a deviation is about to be made in the line of a railway already constructed, the arbitrators shall consider the increased value given to the land by the proposed construction of the line of railway, or the increased value given to the land by the proposed deviation, and to the extent that such increased value can be ascertained on the evidence, the same shall be deducted from the sums which would otherwise be awarded to the owners of the land as compensation for their interest in the land.

But where in one year a line of railway is constructed, which at the time increases the value directly or indirectly of all the land in the neighborhood, and years afterwards the company, for some purpose of its own, decides to change the line of the railway across lands which were not touched by the original work constructed, I do not read the Acts as making it the duty of the arbitrators in such case to deduct from the compensation to be awarded to the owners the increased value of the land by reason of the original construction of the railway.

So to read the Acts might do positive injustice, and for this reason—lands in this Province rapidly change from owner to owner. Each purchaser buys at the existing value when he purchases, and without reference to the means by which that value has been reached. If a subsequent purchaser, who is deprived of his land for railway purposes, were obliged to submit to a deduction for the increased value of the land years before by reason of the original construction of the railway, he would be deprived of the value of his land for the benefit of the railway company without any corresponding advantage.

All the Legislature could have intended was, that when the act proposed to be done—whether original construction or proposed deviation—gave increased value to the land, the owner of that land who thereby received or would receive an advantage, should make an allowance for it to the extent of the advantage.

The principle confined within these limits is not only just and reasonable, but was long since recognized by 9 Vic. ch. 81 sec. 26, which was as follows: "The arbitrators shall take into consideration the benefit conferred on the property on which they are arbitrating, as well as the damage done to any particular portion thereof." See *Great Western R. W. Co. v. Baby*, 12 U. C. R. 106, 117, 119, 120.

The general principle is, that where a part of a tract of land is taken for a railroad, and the remainder of the tract is enhanced in value by the proposed construction of the railroad, it is a benefit which ought to be deducted from the injury caused to such portion in arriving at a "fair compensation": *California Pacific R. W. Co. v. Armstrong*, 46 Cal. 85, 7 Am. Rail. R. 259.

There was no evidence that the remainder of the land owned by these proprietors would be enhanced in value by the contemplated deviation. So far as the evidence bears on the point it shews that the proposed deviation across the water front of each of the parcels of land will be an injury rather than an advantage to the remaining parts of the land.



In *Regina v. Buffalo and Lake Huron R. W. Co.*, 23 U. C. R. 208, it was held that the construction of a line of railway along a river front, although *not touching* the land of the complaining party, was the subject of compensation because "it shut him out from all access to the river, except across the line of railway." See further *Widder v. Buffalo and Lake Huron R. W. Co.*, 24 U. C. R. 222, 520, affirmed on appeal, 27 U. C. R. 425.

In the case in 24 U. C. R. 520, Hagarty, J., said at p. 535, "No doubt the plaintiff still had a right of access, as the owner of a lot through which a railway is carried has a right of access from one part of his land to the other, but the convenience of access is materially interfered with. What before was free from risk and interruption is now more or less dangerous and prevented, according to the use made of the the road."

This language is similar to that recently used by Lord Penzance, in *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243. He is reported at p. 263 to have said: "The immediate contiguity to a highway, commonly called a frontage, is a well known and powerful element in the value of all lands in populous districts. Where frontage to a high road does not exist, propinquity and easy access to a high road are equally undoubted elements of value in such districts, distinguishing lands which have them from those which have them not. If, then, the lands of any owner have a special value by reason of their proximity to any particular highway, surely that owner will suffer special damage in respect to those lands beyond that suffered by the general public, if the benefits of that proximity are withdrawn by the highway being obstructed," &c.

It may be that *Regina v. The Buffalo and Lake Huron R. W. Co.*, 23 U. C. R. 208, which was a case in which no land was taken by the company, is shaken by the authority of cases since decided: *Brand et ux. v. The Hammersmith & City R. W. Co.*, L. R. 1 Q. B. 130, L. R. 2 Q. B. 223, L. R. 4 H. L. R. 171; *City of Glasgow Union R. W. Co. v. Hunter*, L. R. 2 Sc. App. 78.

But where a part of a man's land is taken by a railway company, it would seem to be quite competent to the arbitrators to consider not only the injury by the obstruction to the water frontage, but other injuries done to the remainder of his land. See *Great Western R. W. Co. v. Warner*, 19 Grant 506; *Duke of Buccleugh v. Metropolitan Board of Works*, L. R. 5 H. L. 418; *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243.

If it had appeared that the arbitrators had awarded compensation for loss of water frontage in reference to the diminished enjoyment of the land not taken, without at the same time considering how far the obstruction would be reduced by means of crossings, &c., it might be my duty to set aside the awards, but I do not find that the arbitrators allowed any compensation whatever to the land owners in respect to the diminished enjoyment of the remainder of the lands by depriving them of the water frontage.

What the arbitrators appear to have done is, to have assessed the value of the land actually taken, and considering that it is water frontage, in accordance with the testimony of many witnesses, valued it at so much per foot, instead of so much per acre, like the remaining part of the land. I cannot hold that in doing so the arbitrators acted against any of the principles which the Legislature have laid down for their guidance, or any of the principles which according to the common law must be held to apply to such awards.

Where several witnesses swore that the water frontage was in their opinion of the value of from \$15 to \$20 per foot I could not presume to decide that the sworn arbitrators did wrong in assessing the value at \$10 per foot. Much in such a case is left to the sound discretion of arbitrators. So long as it appears that the discretion was honestly exercised and that no principle of law has been violated the award must be sustained. See *Duke of Buccleugh v. Metropolitan Board of Works*, L. R. 5 H. L. 418.

Having read the evidence I see no clear ground for interfering with any of the awards.

The petition must be dismissed with costs.

*Petition dismissed with costs.*

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SCARLETT V. GREAT WESTERN RAILWAY COMPANY.

*R. W. Act of 1868, sec. 20—Construction.*

Sub-sec. 4, sec. 20 of the Railway Act of 1868, 31 Vic. ch. 68, D, does not extend to all cases in which negligence is charged against the railway company, but to cases only of neglect coming within the provisions of sub-secs. 2 and 3. They are not prevented therefore from stipulating for a limited liability in other cases.

DEMURRER. Declaration : for that the plaintiff delivered to the defendants, as and being carriers of goods by railway from Brantford to Toronto, certain goods of the plaintiff to be by them carried from Brantford aforesaid to Toronto aforesaid, and there delivered for the plaintiff within a reasonable time in that behalf, for reward to the defendants; and the defendants as such carriers, received the said goods for the purpose and on the terms aforesaid, and a reasonable time for carrying and delivering the same as aforesaid elapsed yet the defendants neglected for a long and unreasonable time in that behalf to carry and deliver the said goods as aforesaid, whereby the plaintiff was deprived of the use of the said goods for a long time, and the same were diminished in value.

2. Also, for that the defendants were carriers of goods by railway for hire from Brantford to Toronto, and the plaintiff delivered to the defendants and the defendants received as such carriers certain goods of the plaintiff, to be by the defendants safely carried from Brantford to Toronto aforesaid, and there delivered for the plaintiff for reward to the defendants; and all conditions were performed,

and all things happened, and all times elapsed necessary to entitle the plaintiff to have the said goods safely carried as aforesaid, yet the defendants did not safely carry the said goods as aforesaid, and so negligently carried the same that they were broken, damaged, and spoiled.

3. Also, for that the defendants were carriers of goods by railway for hire from Brantford to Toronto, and the plaintiff delivered to the defendants and defendants received as such carriers certain goods of the plaintiff, to be by the defendants safely taken care of and safely and securely carried from Brantford to Toronto aforesaid, and there delivered for the plaintiff within a reasonable time in that behalf, for reward to the defendants; and are a reasonable time for carrying and delivering the same as aforesaid elapsed yet the defendants did not take care of the said goods, and safely and securely carry and deliver the same for the plaintiff as aforesaid, whereby the same were lost to the plaintiff.

Third plea, to the first count: that the said goods were machinery, and were delivered by the plaintiffs to the defendants, and were received by them, to be carried from Brantford to Toronto under a special contract, some of the terms and conditions of which contract were that the defendants should not under any circumstances be liable for loss of market or other claims arising from delay or detention of any train, whether at starting or at any of the stations, or in the course of the journey; nor for damages occasioned by delays caused by storms, accidents, or unavoidable causes; and that the said goods should be carried at the owners' risk, and not otherwise. And the defendants say that the said goods were received by them and carried as aforesaid, under and subject to the said terms and conditions, and not otherwise, and that the delay and grievance complained of were a delay, damage and risk, within the meaning of the said conditions, and not otherwise.

Fourth plea, to the second and third counts respectively: that the said goods in the said counts respectively mentioned were machinery, and were and are the same



goods as in the first count mentioned, and were delivered by the plaintiffs to the defendants, and were received by them, to be carried from Brantford to Toronto under a special contract, some of the terms and conditions of which contract were the terms and conditions in the third plea stated. And the defendants say that the said goods were received by them and carried as aforesaid, under and subject to the said terms and conditions, and not otherwise; and the grievances, breakages, damages, spoiling and loss, in the first and second counts respectively complained of, were grievances, breakages, damages, spoiling and loss, within the meaning of the said terms and conditions, for which the defendants were not to be liable, and of which the risk was to be borne by the plaintiff.

Replication to the third and fourth pleas: that the damages referred to in those pleas were occasioned by the negligence of the defendants in the carriage of said goods, and in negligently, and in such an insecure and negligent manner, placing the same on the defendants' carriages on which they were placed that by means thereof they were damaged and spoiled, as in the declaration is alleged.

Demurrer to the replication, on the grounds:

1. That the said replication admits that the said goods were to be carried at the plaintiff's risk, and on the other conditions in the said pleas mentioned, and under the said conditions the defendants were absolved from liability for the alleged causes of action.

2. That the defendants in the said third and fourth pleas shew a state of facts upon which they could not be liable for the damages and grievances in the said pleas respectively pleaded to, and the plaintiff in the said replication does not state any facts or circumstances which avoid the matters in the said third and fourth pleas respectively pleaded.

February 23, 1877. *McMichael*, Q. C., argued the demurrer for defendant, and *D. B. Read*, Q. C., for the plaintiff.

March 9, 1877. GALT, J.—The cases of *Scott et al. v. Great Western R. W. Co.*, 23 C. P. 182, and *Allan v. Great Western R. W. Co.*, 33 U. C. R. 483, decided that the 4th sub-sec. of sec. 20 of the Railway Act of 1868, as amended by sec. 5 of 34 Vic. ch. 43, did not apply to these defendants. After these cases had been disposed of, the Legislature passed the 38 Vic. ch. 24, D., which by the 4th sec. enacts that “This \* \* Act and sec. 20 of the Railway Act, 1868, as amended by sec. 5 of the Act 34 Vic. ch. 43, shall apply to every railway company heretofore incorporated.” There is, therefore, now no question that the said sec. 20, as amended, does include the defendants. The 20th section, so far as is necessary for the present discussion, is now as follows :—

“Sub-sec. 2. The trains shall be started and run at regular hours, to be fixed by public notice, and shall furnish sufficient accommodation for the transportation of all such passengers and goods as are within a reasonable time previous thereto offered for transportation at the place of starting, and at the junctions of other railways, and at usual stopping places established for receiving and discharging way-passengers and goods from the trains.

“Sub-sec. 3. Such passengers and goods shall be taken, transported and discharged, at, from and to such places, on the due payment of the toll, freight, or fare legally authorized therefor.

“Sub-sec. 4. The party aggrieved by any neglect or refusal in the premises, shall have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servants.”

The question to be considered in this case is, what is the effect of the 4th sub-section, and does it extend to all cases in which negligence is charged against the company, or is it confined to the provisions mentioned in the previous sub-sections? It appears to me that the latter is the true construction, and that it is limited to the cases mentioned in the 2nd and 3rd sub-sections. These are : First : that the trains shall be started and run at regular hours, to be fixed

by public notice, and shall furnish sufficient accommodation for the transportation of passengers or goods. Second : that such passengers and goods shall be carried and discharged on the due payment of the toll or freight. That this is the true construction appears from the very words of the 4th sub-section, which are, " that the party aggrieved by any neglect or refusal in the premises shall have an action against the company, from which action the company shall not be relieved by any notice, condition, or declaration, if the damage complained of arises from any negligence or omission of the company or of its servants."

It is to be observed that the company are not bound to provide accommodation for all persons and all goods, but only for such as offer themselves or are brought to the stations of the company a reasonable time before the time appointed for the trains to leave ; and if the servants of the company are guilty of neglect of duty in respect to them, the company are to be held responsible notwithstanding any notice, &c. They are not responsible in all cases, but only in those where they have failed to comply with the statutory provisions. For example, it never could have been intended that if a train was delayed by stress of weather or other unavoidable accident, the company should be held responsible for any loss or damage sustained by any passenger whose journey may have been interrupted, or merchant whose goods may have been detained ; nor in case a larger number of passengers should unexpectedly offer themselves than the ordinary train of the company can accommodate.

It is their duty to start their trains and carry the passengers, and if they fail they are to be liable to an action, from which they cannot relieve themselves by any notice, if the failure arises from the omission or negligence of their servants.

In all suits against railway companies arising from injury sustained either to person or property, particularly as respects the former, the ground of the charge is negligence, and the company is held responsible or exonerated according

to the views which the jury may take of their conduct in that respect ; and to say that a railway company is to be responsible in every case where negligence or omission may be attributed to their servants, is to say that they cannot in any case protect themselves by stipulating for a limited liability ; in other words, they are obliged to incur the same responsibility as carriers of machinery, (as in the present case,) which is very liable to injury, as for railway bars, which are of such a description as to be almost beyond the reach of casual injury.

As respects the present case, as regards the first count the plea is a complete answer ; and as to the second and third counts it is also an answer, unless the plaintiff can, on the trial, shew that the injury sustained was owing to some cause other than those from which the defendants have stipulated they shall be exonerated.

It is not sufficient to say that the injury was occasioned by negligence, but the plaintiff must go further, and shew that it was a negligence not covered by the condition, as was done in two of the cases cited by Mr. Read.

*Judgment for defendants.*

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EASTER TERM, 40 VICTORIA, 1877.

*From May 21st to June 9th.*

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*Present :*

THE HON. ROBERT ALEXANDER HARRISON, C. J.  
“ “ JOSEPH CURRAN MORRISON, J.  
“ “ ADAM WILSON, J.

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KERR V. THE HASTINGS MUTUAL FIRE INS. CO.

*Fire policy—Assignment after loss—Representation as to value and title.*

An assignment of a claim to compensation under a fire policy, after the loss has occurred, is not a breach of the ordinary condition against assigning without license of the insurers; but the safer form of transfer is to assign only the money payable in respect of the loss, and not the policy, especially if the loss be partial only, and less than the sum insured.

The application for the policy described the stock in trade to be worth \$5,000, and the ownership of the goods was stated to be in the two Messrs. R., whereas the value was only \$3,500, and the stock only belonged to the two, the rest of the property belonging to them in separate portions, and part to the wife of one.

The statements in the application were declared by the insured to be “a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to me and are material to the risk. And I hereby agree and consent that the same shall be held to form the basis of the liabilities of said company, and be binding upon me as material representations in reference to the insurance to be granted hereon.” It was left to the jury to say whether the insured made any misrepresentation or misstatement in the application for insurance, or any fraudulent claim against the company, and they answered in the negative.

*Held*, that the whole declaration was qualified by the words “so far as the same are known to me and are material to the risk:” that the question asked of the jury was substantially a question whether the value was stated by the assured truly so far as known to him; and that on the evidence their finding could not be disturbed.

*Held*, also, that the words “in regard to the condition, situation, value, and risk of the property to be insured” did not apply to the goods being joint or several property, and that it was not material to the risk.

An allowance of \$200 was made to the defendants under a condition that in case of the removal of property to save it the defendants would contribute ratably with the assured and other companies interested to the expenses of salvage, and the damage sustained by the removal.

ACTION on a fire policy, dated 10th March 1875, granted to Robert Rollins and Arthur John Rollins, in the policy described as Rollins & Bro., for one year, ending on the 10th February, 1876. The declaration stated that the insurance was for \$2500 : on general stock of country store goods, consisting of dry goods, groceries, cutlery, hardware, boots, shoes, and patent medicines, contained in the first flat of a frame store \$2000 : on general household contents, furniture, linen, and wearing apparel \$350 : on two cabinet organs contained therein \$150, contained in the second flat of the store used as a dwelling in the village of Berwick : that a fire occurred on 8th September, 1875 ; and that after the loss the assured by deed assigned under the statute in that behalf, the money payable in respect of the said loss under the policy, over to the plaintiff.

Pleas : 1. Policy not defendants' deed.

2. That the assured did not sustain loss by fire.

3. That the assured did not render in writing and signed by them a particular account of the alleged loss under oath, stating the time, origin, and circumstances of the fire as particularly as the nature of the case would admit of, the occupation of the building containing the property insured, the whole cash value and ownership of the property, the interest therein, and the amount of loss or damage.

4. That the assured assigned their interest in the policy without the consent in writing of the company, contrary to the terms of the policy.

5. That the policy was to be void if assigned without the consent in writing of the defendants, and the assured did assign it without such consent.

6. To the fifth like effect as the fifth plea, under another condition of the policy.

7. That the policy provided that fraud or attempt at fraud should avoid the policy, and that the assured attempted to

defraud the defendants by endeavouring to prove a loss and damage by preferring a claim for property which had not been destroyed, and for a much greater amount than the value of the goods destroyed.

8. The policy provided that if the assured, in and by the application for such insurance, should make any erroneous representations, or omit to make known any fact material to the risk, the policy should be void; and the defendants alleged that the assured made erroneous representations in their application.

Issue.

Particulars were delivered under the seventh plea: that the assured by their proof of loss stated that they had lost property to the extent of \$3295 by the fire, whereas a large portion of the stock was saved, and the defendants believe the assured did not sustain a loss to anything like so large an amount.

And under the eighth plea: that the assured represented the goods insured as belonging to R. Rollins & Bro., whereas part belonged to them and part to R. Rollins and part to A. J. Rollins, and represented their stock-in-trade to be worth \$5000, whereas it was not worth that amount; and that stock was taken every year whereas it was not so taken.

The cause was tried at the Assizes held at Hamilton in December, 1876, before Moss, J. A., with a jury, when a verdict was rendered for the plaintiff for \$2108.75.

The case for the insured was, that they had taken stock in August, 1875, the month before the fire, and that the amount of such stock was ..... \$3440 00

After that, and before the fire, they bought goods

to the amount of .. 177 55

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\$3617 55

That they had sold between these dates goods to

amount of, after deducting their profits ..... 464 12

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Leaving as stock on hand at the time of the fire \$3153 43

Of these goods there were not insured...	\$356	00
Goods saved from fire .....	\$1064	98
Less 40 per cent. damage to same	425	78
	<hr/>	639 20
		<hr/>
		995 20
Loss and damage .....	\$2158	23
Robert Rollins's loss on furniture, &c.....	564	75
J. Rollins's loss on furniture, &c.....	571	90
	<hr/>	
Total loss .....	\$3294	88

The conclusion of the application was as follows: "I hereby declare that the foregoing is a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to me and are material to the risk. And I hereby agree and consent that the same shall be held to form the basis of the liabilities of said company, and be binding upon me as material representations in reference to the insurance to be granted herein."

The evidence was gone into very fully for and against the claim.

At the close of the plaintiffs' case the defendants' counsel moved for a nonsuit.

1. Because the 4th and 5th pleas, as to the assignment of the policy by the assured, were proved.

2. Because the 8th plea was proved, for the application shewed that the goods in hand were valued at \$5000, whereas they were not shewn to have been anything like that value at the time.

3. The assured did not correctly state their title to the goods; it is clear that one of the organs was not the property of the assured.

4. The proof of loss furnished was not sufficiently particular.

Leave was reserved to move.

For the defence, *Thomas Bradley*, *William Brown*, *Gilbert McCallum*, and others, said they waited at the fire until they thought the store was cleaned out.



*A. K. Boyd* said: I thought there was from \$1000 to \$1200 worth of goods in the store.

*Stephen Walsh* said: A week before the fire I looked around and said I would not give \$1000 for the stock.

In reply, *A. J. Rollins* said: Some of the dry goods were not removed at the time of the fire. There were thirty-six drawers in the store and only three of them were saved. All the finest goods were kept in these drawers. I cannot give any estimate of the value of silks, or lace, or brilliants or fine cottons on hand.

Other witnesses were also called.

The learned Judge charged the jury that it was agreed that the only questions for them to decide were upon the two last pleas. If they were of opinion that the Rollins attempted to defraud the company by making a claim for property which they knew had not been destroyed, they should find for the defendants. If they thought the Rollins made any false and fraudulent misrepresentation in the application they should find for the defendants.

He left the question in that form because the defendants had leave to move if the condition as to the value was a warranty. He directed their attention to the evidence bearing upon the amount of damage, and left these two questions to them: 1. Did the Rollins make any misrepresentation or misstatement in the application for insurance? 2. Did the Rollins make any fraudulent claim against the company?

The jury answered both questions in the negative, and they assessed the damages \$2000 for the goods, \$350 for the furniture, &c., and five months interest \$58.75. Total, \$2408.75.

Leave was reserved to defendants to move to reduce the verdict by the sum of \$200—under the salvage clause the assured must bear a proportion of the loss.

The defendants' counsel objected to the charge. He contended the learned Judge should have told the jury that it was proved the value of the goods at the time of the application was less than \$5000, and that the defendants were therefore entitled to a verdict on that issue.

During Hilary term, February 8, 1877, *G. D. Dickson* obtained a rule calling on the plaintiff to shew cause why the verdict rendered should not be set aside and a new trial had, or a nonsuit entered, on the grounds: 1. That the fourth and fifth pleas were proved. 2. That the assured in and by their application for insurance misrepresented the value and ownership of the goods and property upon which the insurance was sought and effected. 3. That the assured did not furnish proper proof of loss as required. 4. That the learned Judge admitted evidence in rebuttal of witnesses who had been sworn for the plaintiff before the defence was opened, who had been in Court although notified to remain out of the Court room. 5. That the verdict is contrary to law and evidence, and the weight of evidence, on this, amongst other grounds: that the jury find *Rollins & Bro.* made no misrepresentations or mis-statements in the application for insurance, when it was proven that they misrepresented the ownership and value of the goods, and also in this, that the jury found that the *Messrs. Rollins* made no fraudulent claim against the company, whereas the weight of evidence was, that there were not all of the goods destroyed as claimed for. 6. That the damages are excessive, and ought to have been at most only for \$707.

During this Term, May 30, 1877, *E. Martin*, Q. C., shewed cause. The case of *Waydell v. Provincial Ins. Co.*, 21 U. C. R. 612, shews that the assignment of a claim for loss after the loss has happened is not a breach of the condition of a policy which forbids the assignment of the policy without the consent of the insurers. The statement of the value of the goods at the time of the application at \$5000, even if the goods were not worth so much, is not a warranty binding the assured to the exact sum stated: *Riach v. The Niagara District Mutual Ins. Co.*, 21 C. P. 464; *Chaplin v. Provincial Ins. Co.*, 23 C. P. 278; *Redford v. Mutual Fire Ins. Co., of Clinton*, 38 U. C. R. 538, *Hopkins v. Provincial Ins. Co.*, 18 C. P. 74; *Wyld v. Liverpool and London and Globe Ins. Co.*, 23 Grant 442, 450; *Billington v. Provincial Ins. Co.*, 24 Grant 299;

*Goldsmith v. Gore District Mutual Fire Ins. Co.*, 27 C. P. 435. The defendants did not object to the assured not describing the different kinds of goods destroyed, for any other reason than that they alleged the goods had not been on the premises at all, and had not been destroyed ; and the assured furnished affidavits to the defendants shewing the loss to be as great as the assured had represented, and to these affidavits the defendants never objected. The defendants insisted at the trial that the only loss the assured had sustained was the damage done to the goods saved, \$425, and the loss of furniture, &c., \$350 ; but that was a question for the jury, and there was quite sufficient evidence to sustain the finding. He referred also to *Shannon v. Hastings Mutual Fire Ins. Co.*, 26 C. P. 380 ; *Park v. Phoenix Fire Ins. Co.*, 19 U. C. R. 110 ; *Ashford v. Victoria Mutual Ass. Co.*, 20 C. P. 434.

*G. D. Dickson* supported the rule. In the application the stock-in-trade is described to be worth as the average amount of it \$5000, and the ownership of the goods insured is described to be in the two Messrs. Rollins ; whereas the value of the stock was of much less value than \$5000, that is, as assured said at the trial, only \$3500, and it was only the stock which belonged to the two, the rest of the goods belonged so much to one and so much to the other of them. There was a misrepresentation therefore, contrary to the policy, in both of these respects. And according to *Anderson v. Fitzgerald*, 4 H. L. 484 ; and *Mason v. Agricultural Mutual Assurance Association of Canada*, 18 C. P. 19, in Appeal, the policy is void. The over-valuation of the stock will avoid the whole policy, and in like manner the wrongful information given as to the title of the furniture and organs, and even although the organs are not now claimed, will defeat the whole policy : *Billington v. Canadian Mutual Fire Ins. Co.*, 39 U. C. R. 433. The assured not only described all the stock and goods as belonging to them in their application, but in their proof of and claim for loss.

June 30, 1877. WILSON, J.—The first part of the rule, as to the fourth and fifth pleas, fails, because it is well settled that an assignment of the claim to compensation after the loss has occurred is not a breach of the ordinary condition against assigning without the license of the insurers.

Parties must, however, be careful that they do not violate the condition against assignment, even when the loss has happened.

If there is a total loss, or if the loss were the whole amount of the insurance money, an assignment even of the policy, in place of an assignment of the money or loss to which the insured is entitled, would not be contrary to the usual condition, because there was to be and could be no further claim upon it. But if the loss were partial only and less than the total sum insured for, it might not be safe to assign the policy. For it might be contended that the assignment had destroyed not only the future insurance but that it had created a forfeiture of the unpaid claim or cause of action for the past loss.

The proper way would be to assign only the money payable for and in respect of the loss which had accrued. And as such a transfer would be sufficient for the assignee in all cases, whether the loss was total or partial, or the whole of the insurance money had become payable or not, it is the safer form of transfer to adopt in every case after the loss has happened.

The third part of the rule, as to the sufficiency of proof of loss furnished, was fairly for the jury under the circumstances. And the fourth part of it was a matter within the discretion of the learned Judge, whether he would allow the witnesses in rebuttal to be recalled although they had been in Court when they should not have been. It was not a matter perhaps much relied upon, for it was not argued before us.

The fifth and sixth branches of the rule may be disposed of in considering the second part of the rule, and that applies to the alleged misrepresentation in the value of the goods and of the ownership of the property at the time of the application.



So far as the motion has reference to a new trial with respect to the amount of damages, we cannot interfere.

The whole case is unsatisfactory, but what can we do unless we take the case from the jury? They had to determine what goods were destroyed and damaged. The contest at the trial was, whether such an amount of goods was in the shop at the time of the fire as the assured represented, and if so, whether anything like the quantity claimed for was lost or damaged. There was evidence on both matters for the plaintiff, and there certainly was very strong testimony against them. No further evidence can be given on the subject, and there is no reason to suppose that the verdict might not be for the like amount on a future trial if it were granted. We can only deal with the case in its strict legal aspect. Was the representation by the assured that the stock was worth \$5000, at the time of the application, when it was worth only \$3500, such a misrepresentation as avoided the policy; and was the representation that the furniture and organs were the property of Rollins & Brother, when one organ belonged to one of them and the other organ belonged to the wife of the other of them, and the furniture, &c., were the property of the two brothers in separate portions, and not joint property, such a misrepresentation as defeated the policy?

Were these statements matters of warranty according to the application?

In *Fowkes v. Manchester and London Life Assurance and Loan Association*, 3 B. & S. 917, the declaration for a life policy, which declaration was to be taken as part of the policy, stated that "if any statement in the declaration \* \* was untrue, or if the assurance by the policy should have been effected by or through any wilful misrepresentation, concealment, or false averment whatsoever, or if \* \* (the assured) should go to any place beyond the limits of "Europe," &c., "the policy should be void." The declaration continued: "I do hereby declare that the above written particulars are correct and true throughout, and I do hereby agree that this proposal and declaration shall be the basis

of the contract between me and \* \* (the association) and if it shall appear that any fraudulent concealment or designedly untrue statement be contained therein, then the policy shall be void, and all the money paid on account, shall be forfeited." Held, that the policy and declaration must be read together, and so reading them the policy was not avoided by an untrue statement in the declaration unless *designedly* untrue.

In *Riach v. Niagara District Mutual Ins. Co.*, 21 C. P. 464, the application for insurance, which was to be read as part of the policy, contained "present estimated value cash \$5800." The jury found the value did not exceed \$3500. Held the over estimate did not avoid the policy.

Galt, J., p. 369, said a new trial should be granted to determine "whether at the time of making the application the plaintiffs knew that the value was over-estimated," and that the word *estimated* occasioned the difficulty.

Gwynne, J., p. 471, said, "there should be a new trial for the purpose of enabling a jury to express their opinion whether or not the estimated value stated by the plaintiff was a fair estimate, honestly made with a reasonable belief in its truth entertained by the plaintiff, for that appears to me to be the question really involved in so far as the above words in the application are concerned."

Hagarty, C. J. C. P., said, p. 472, "I think that all we can hold the plaintiff to here is, that the 'present estimated value' is his honest estimate at the time, not that it is warranted to be absolutely true. \* \* We cannot help desiring that another jury should be asked the question whether, assuming, our view of the legal bearing of the assurance, it is possible for a man honestly to state that his goods were fairly estimated at \$5000, when in truth they were only worth \$3500." See also *Chaplin v. Provincial Ins. Co.*, 23 C. P. 278, and *Redford v. Mutual Fire Ins. Co., of Clinton*, 38 U. C. R. 538.

The conclusion of the application before mentioned is precisely the same as it was in *Laidlaw v. The Liverpool and London Ins. Co.*, 13 Grant 377, "that the foregoing is

a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, *so far as the same are known to the applicant, and are material to the risk.*" The words I have italicised are very important, they limit the generality of the foregoing declaration. Then the clause continues, "and I hereby agree and consent that the same shall be held to form the basis of the liabilities of said company, and be binding upon me as material representations in reference to the insurance to be granted hereon." That language constitutes a warranty, but it is all limited by the italicised part before mentioned.

The assured did not make a just and true exposition of the value of his stock of goods, but can it be said that it was not just and true *so far as the same was known to the assured*? I cannot say that it can, and I think the question put to the jury: "did the assured make any misrepresentation or mis-statement in the application for insurance"? was substantially a question whether the *value* was stated by the assured justly, fully, and truly, so far as the same was known to the assured; and to that they have answered in favour of the assured. So far I think we cannot interfere.

Then was the statement by the assured in their application that the furniture, &c., and the organs, all the property in fact but the stock of shop goods, were their joint property when it was not so, but was their several property, a breach of the warranty just referred to? Here I may say that although the application and policy treat the goods which are covered by the \$350 and the \$150 of the insurance money as joint property, and although the printed claim paper treats such property as joint property, yet the two accompanying proofs of loss state explicitly that the loss of one of the assured is in respect of certain articles of furniture, &c., and the loss of the other is in respect of certain other articles of the furniture, &c. So that the defendants did know of their individual rights in such property immediately after the loss, and did not object to it.

The first enquiry is, do the words of what I may call the

warranty apply to such a matter? The words are, that the statement made is a just, full, and true exposition of all the facts and circumstances in regard "to the condition, situation, value, and risk of the property to be insured," so far as the same are known to the applicant and are material to the risk. I do not think it was material to the risk whether the two applicants were jointly or severally interested in these goods. They certainly *knew* the fact that they were not jointly but severally interested in them. The words *situation*, *value*, and *risk*, do not apply to the goods being joint or several property, nor does the word *condition*, as I think, apply either.

The only other question is, whether under the provision of the policy, "that in case of the removal of property, in order to save it from being burnt, this company will contribute ratably with the assured and other companies interested *to the expenses of salvage, and the damage which the property may sustain by such removal*," the defendants should be allowed the whole amount which they have claimed, or any, and what part of it? It has been shewn that there was "damage by water, breakage, &c., caused by removal and salvage" \$425.98, but what the expense of the salvage was, or what the damage was to the property which was caused by the removal, we cannot say. The defendants claim an allowance of \$200, and probably, under all the circumstances, it may not be unreasonable to allow it.

The rule will be discharged on the plaintiffs reducing their verdict by \$200.

HARRISON, C. J., and MORRISON, J., concurred.

*Rule accordingly.*

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## THOMSON V. FEELEY.

*Agreement by secretary of proposed company—Personal liability—Equitable defence—Pleading.*

The plaintiff sued defendant on an alleged agreement, that in consideration that the plaintiff would make a promissory note payable to the defendant's order for \$500, and deliver it to defendant to be negotiated, defendant promised that the plaintiff should at any time before the maturity of the note have the option of subscribing for one share of \$500, in a company to be incorporated under "The Ontario Joint Stock Letters Patent Act, 1874," and called the Aldershott Match Company; and that, if the plaintiff should before such maturity decline to take said share, the said company would take up the note and indemnify the plaintiff against it. The declaration averred that the plaintiff delivered the note to defendant, who negotiated it; that before its maturity the plaintiff declined to take the share, and so notified defendant, but that neither the defendant nor the company took up the note, and the plaintiff had to pay it.

Defendant pleaded, on equitable grounds, that he was one of the projectors and secretary of said company, and as such before the issue of the Letters Patent applied to the plaintiff to take a share, which the plaintiff agreed to do on the terms of the following receipt then given by him to defendant:

"Hamilton, 13th April, 1876.

"Mr Thomson has given me his note for \$500 for one share in the Aldershott Match Company, which he has the privilege of declining at the expiry of the note; and if so this company will take up the note.

C. FEELEY, *Secretary*:"

That defendant then gave his note accordingly: that afterwards the company was incorporated: that the defendant was a shareholder and the secretary, and in that capacity only endorsed the note to the company, which accepted it on the terms of the receipt and discounted it: that before its maturity the plaintiff notified the company that he declined to take the share, but afterwards withdrew such notice and paid the note at maturity, and was treated as a shareholder, and voted and acted as such at meetings of shareholders: that it was not the intention of either plaintiff or defendant that defendant should be personally bound by the receipt, or in respect of said note or share, but they both intended that the plaintiff should look only to the company in his dealings under the receipt in respect of said share, and defendant was described in the receipt as secretary in order to exempt him from personal liability; and he denied any fraud (which was charged in the second count) and denied that he contracted with the plaintiff as alleged.

*Held*, that the defendant was *primâ facie* personally liable, there being at the time when he signed the receipt no company, and therefore no principals whom he could bind.

That part of the plea was proved, alleging the intention of the parties to have been that defendant should not be personally bound by the receipt, but that the plaintiff should look only to the company. *Semble*, that this could form no defence, being in contradiction of the written agreement. But the parties having gone to trial on the plea, and there being a verdict for the plaintiff, the verdict was ordered to be entered for defendant on that branch of the plea, and the plaintiff left to move in arrest of judgment, unless defendant should elect to amend his plea.

Suggestions as to a form of plea which might shew a good defence.

DECLARATION. First count: that defendant was one of the projectors and the secretary of a company intended to be incorporated by Letters Patent under "The Ontario Joint Stock Companies Letters Patent Act, 1874," under the name of "The Aldershott Match Company;" and in consideration that the plaintiff would make a promissory note, dated the 13th of April, 1876, promising to pay to the order of the defendant, secretary of the proposed company, at the Bank of Hamilton, at Hamilton, for the sum of \$500, three months after date, and would deliver the same to the defendant to be negotiated by him, the defendant promised to and agreed with the plaintiff that the plaintiff should at any time before or at the maturity of the note have the option of taking and subscribing for one share of \$500 of the proposed capital stock of the said company, or of declining to take and subscribe for the said share; and that if the plaintiff [should on or before the maturity of the said note decline to take and subscribe for the said share, the said company proposed to be incorporated would take up, pay, and satisfy the said note to the holder thereof, and would indemnify and save harmless the plaintiff from any loss or damage by reason thereof. And the plaintiff made the said note and delivered it to the defendant for the purpose and on the terms aforesaid, and the defendant negotiated, and endorsed the same to the Bank of Hamilton, who became the lawful holders thereof for value, and before and at the time of the maturity of the said note the plaintiff declined to take and subscribe for the said share in the said proposed company, and gave notice to the defendant of such election and required the defendant to take up the said note and pay and satisfy the same. Yet the defendant did not nor did the said company take up the said note, nor pay or satisfy the same to the Bank of Hamilton, the lawful holders thereof, nor indemnify and save harmless the plaintiff from loss and damage by reason thereof, and the plaintiff was compelled to pay to the Bank of Hamilton the amount of the said note and interest thereon, and the fees and charges of protesting the same.

Second count: that the defendant, with the intention of inducing the plaintiff to take and subscribe for the one share of the stock of the company, and to make and deliver his note for \$500, falsely and fraudulently represented to the plaintiff that certain persons, well known to the plaintiff, had taken and subscribed for a large number of shares of the stock of the proposed company and had paid up a large proportion thereof, and by reason of such false and fraudulent representations induced the plaintiff to make the said note for the use of the company upon the terms in the first count mentioned, [and concluding as in the first count.]

The common counts were added.

Plea, on equitable grounds: that the defendant was one of the projectors and secretary of the said company, and in that capacity, prior to the issue of the letters patent, on behalf of the projectors he applied to the plaintiff to take one share of the stock of the said intended company amounting to \$500, which the plaintiff agreed to do upon the terms set forth in a receipt then given by the defendant as such secretary to the plaintiff as follows:

“Hamilton, 13th April, 1876.

“Mr. Thomson has given me his note for \$500 for one share in the Aldershott Match Company, which he has the privilege of declining at the expiry of the note; and, if so, this company will take up the note.

“C. FEELEY, *Secretary.*”

And the plaintiff then gave his note for \$500, payable to the defendant as secretary of the intended company, upon the terms contained in the receipt. That afterwards, on the 26th of April, 1876, the patent issued duly incorporating the said company under the said statute in that behalf: that the defendant after incorporation was a shareholder and was appointed secretary of the company, and in that capacity, but not otherwise, he indorsed the said note to the company, and delivered it to the president of the company, and the company accepted it on the terms of the receipt, and discounted the same on behalf

of the company : that prior to the maturity of the note the plaintiff notified the company that he declined taking such share, but afterwards and before the maturity of the note the plaintiff withdrew his said notice and paid the note at maturity, and after such payment he was acknowledged and treated by the company and by the shareholders of the company, including the defendant, as a shareholder for the said one share, and was entered as such on the list of shareholders exhibited at the meetings of shareholders of the company ; and afterwards the plaintiff attended several meetings of the shareholders of the company, and voted and acted thereat as a shareholder, and was recognized as a shareholder by the company and the other shareholders. And the defendant says it was not the intention of the plaintiff or of the defendant that the defendant should be personally bound by the receipt, or that the plaintiff should have any recourse against the defendant upon it, or in respect of the said note or share ; but on the contrary they both intended that the plaintiff should look only to the company in his dealings under the receipt in respect of the said share, and the defendant was described in the receipt as secretary in order to exempt him from personal liability ; and he denies the charge of false and fraudulent representation made against him in the declaration, and denies that he contracted and agreed with the plaintiff as therein alleged.

Issue.

The cause was tried before Blake, V. C., at the Chancery Spring Sittings, 1877, at Hamilton, when a verdict was rendered for the plaintiff and the damages were assessed at \$526.04.

The evidence was rather long. It was shewn clearly that both the plaintiff and the defendant believed the defendant was binding the company by the receipt he gave the plaintiff, and that it was to the company the plaintiff looked for the fulfilment of it.

In other respects the evidence was contradictory. As to what meetings of the shareholders and how many of them



the plaintiff attended, and whether he attended as a shareholder, taking part as such in the business of the company—or in order to get repayment of the \$500 note he had given; that is, whether he had or had not elected in fact, or by his conduct was bound to become, and so did become in fact or in law a member of the company. There was contradictory evidence also as to whether the defendant had or had not by untrue inducements respecting those persons whose names were on a paper shewn by him to the plaintiff, for so much stock, induced him to believe that these persons would take or had taken stock to the amounts therein mentioned. On these points there was no finding by the learned Vice Chancellor. The entry in the copy of notes of the trial returned was this minute at the close of the evidence: “After hearing argument, there will be a decree for plaintiff for \$526.04, with costs.”

During this Term, May 25, 1877, *E. Martin*, Q.C., obtained a rule calling on the plaintiff to shew cause why the verdict entered for the plaintiff should not be set aside and a new trial had, or a verdict entered for the defendant, on the ground that the verdict was against law and evidence, and that it was proved on the trial that the plaintiff contracted with “The Aldershatt Match Company,” and not with the defendant personally, and that the plaintiff in fact became a shareholder, and also that no contract could legally be made on behalf of the company to refund the money paid by the plaintiff.

June 8, 1877. *Ferguson*, Q. C., shewed cause. There are two questions here: First, whether the contract which the plaintiff made was with the company or with the defendant? Second, whether the plaintiff became a shareholder of the company? The evidence shews the plaintiff attended a meeting of the shareholders of the company, or it may be more than one meeting, but it was for the purpose of getting payment of the note he had given, and any inference from his attendance at such meeting or meetings as a shareholder is rebutted. There was also evidence of mis-

representation by the defendant personally, by which the plaintiff was induced to give the note. He referred to *Scott v. Lord Ebury*, L. R. 2 C. P. 255; *Kelner v. Baxter*, L. R. 2 C. P. 174; *Laing v. Taylor*, 26 C. P. 416; *Re Warren's Blacking Co.*, *Pentelow's Case*, L. R. 4 Ch. 178; *Re Aldborough Hotel Co.*, *Simpson's Case*, L. R. 4 Ch. 184; *Kent v. Freehold Land and Brick-making Co.*, L. R. 4 Eq. 588; *Weeks v. Profert*, L. R. 8 C. P. 427, 438.

*E. Martin*, Q. C., supported the rule. The company was not incorporated when the note and receipt was made and given. It was incorporated before the note became due. The 37 Vic. ch. 35, sec. 2, sub-sec. 6, and sec. 45, O., shew who was a shareholder in such a company. The plaintiff paid his note given for the stock. He became a shareholder by his attendance at shareholders' meetings, and by his acting as a shareholder. He cannot be a shareholder while the note was current and not one after it matured. He got the company's receipt for his stock, and was fully a shareholder. There was no misrepresentation. If the company, with whom alone the contract was made, are not able to indemnify the plaintiff the damages should only be nominal, if the defendant is liable at all. He referred to *Re Patent Paper Manufacturing Co.*, *Addison's Case*, L. R. 5 Ch. 294; *Laing v. Taylor*, 26 C. P. 416; *Richardson v. Williamson*, L. R. 6 Q. B. 276; *Re Brampton and Longtown R. W. Co.*, *Shaw's Claim*, L. R. 10 Ch. 177; *Rashdall v. Ford*, L. R. 2 Eq. 750.

June 30, 1877, WILSON, J. It is established that although a person signs an agreement on behalf of a company, and the company has no existence at the time, but is only projected or in prospect, he is personally liable, because there is no such principal whom he does or can represent, and the agreement would be wholly inoperative if it were not to be binding on the person who has signed it: *Kelner v. Baxter*, L. R. 2 C. P. 174. But if there be a principal, and the principal never gave authority to one who professes to act as agent, or if the principal had no power to do the

act which the agent has done, the agent is not liable upon any agreement he may have entered into, professing to be such agent, as the principal in the transaction, but he is liable to an action for damages for a breach of warranty of authority to act as the agent of the principal he assumed to represent: *Collen v. Wright*, 7 E. & B. 301; *Richardson v. Williamson*, L. R. 6 Q. B. 276.

The case of *Laing v. Taylor*, 26 C. P. 416, shews that at law the defendant is alone liable on the receipt or agreement which he signed, from the manner in which it is signed.

In *Wake v. Harrop*, 6 H. & N. 768, affirmed 1 H. & C. 202, where the defendants had entered into a charter party in their own names with the plaintiff, and they signed it, "For A. D. & Co., of Messina, H. & Co., Agents," it was held on an equitable plea, which stated that they and the plaintiff believed at the time of the execution of the charter party. that the defendants would not be liable to be sued upon it, although they personally agreed with the plaintiff in the body of the instrument to perform its terms, and which also stated that the defendants had power to bind A. D. & Co., and that the plaintiff was taking an inequitable advantage of the mistake in drawing the charter party, that the plea was a good defence.

In that case there were principals for whom the defendants meant to act, and whom they had power to bind. In this case there were, at the time of the signing of the receipt or agreement, no company which the defendant could bind. If there was a contract made at all it was made then. That contract was, that the plaintiff, who had given the defendant his, the plaintiff's, note for one share in this company, had the privilege of declining it at the expiry of the note, and if he did so "the company will take up the note."

The defendant must be liable in such a case. I have been considering whether a defence could be established if the defendant could shew some such facts as the following: that the plaintiff as well as the defendant knew that the

company spoken of was not then in existence and that it was only in the course of formation, and that it was then expected by both of them to be incorporated before the maturity of the note, and that the agreement was, that the defendant should personally take up the note at maturity if the plaintiff had before given up his share, if the company were not then incorporated, but that the defendant should not be liable personally to take up the note at maturity if the plaintiff had elected before that time to give up his share, in case the company proposed to be formed should be incorporated by or before that time; and that the company was duly incorporated before the maturity of the note, and that the said note was delivered and they discounted it and received the proceeds of it, as the plaintiff intended and well knew; and that both the plaintiff and defendant believed that the instrument drawn was binding upon the defendant only to the extent aforesaid and not otherwise, and that they did not intend to bind the defendant to any other or greater extent than as aforesaid; and that the writing so drawn was a mistake, and is the mistake of both parties, and that the plaintiff is taking an inequitable advantage of such mistake by suing the defendant upon it. And I am inclined to think that it would be a good defence.

An agreement may I think be made by which goods *given* by one to the other of them are not to be paid for by that other, but by which the one who gives them engages to look for payment to a company to be thereafter formed. If there is a present *sale* of the goods, it would be different. Here there was nothing more than making the note payable to the defendant, not for himself but for the purposes of the proposed company, and there is nothing inconsistent in saying the real contract was not that he should personally take up the note at maturity for the plaintiff, but that he should take it up if the company were not incorporated at that time, and the company, but for which he would not be liable, should take it up if it were incorporated.



The defendant cannot be exonerated by shewing there was no agreement at all made when the writing shews there was, but he may shew the agreement made was different from the one which the writing represents.

In this case I think it cannot be said, as the plea alleges, that after the plaintiff gave a notice declining to take the share, and before the maturity of the note, he withdrew such notice, nor was it plainly proved that the plaintiff attended the meetings of the company as a shareholder at any subsequent time, so as to constitute an abandonment of his notice and an acceptance of the share absolutely. That ground of defence fails. But the plea contains several defences. The first one I have just mentioned; the last one is a plea denying the making of the contract, or *non assumpsit*; and the second one is, that the intention of the parties was, that the defendant should not be personally bound by the receipt, or that the plaintiff should have any recourse against the defendant upon it or in respect of the note or share, but on the contrary they both intended that the plaintiff should look only to the company in his dealings under the receipt in respect of the said share. The substance of that plea is what Erle, C. J., refused to receive in evidence in *Kelner v. Baxter*, L. R. 2 C. P. 174, because it was in contradiction of the written agreement between the parties. Here the parties have gone to trial upon these facts. The evidence had therefore to be received, and in my opinion these allegations were proved.

The plaintiff said, he thought he was getting the company's liability; then that he was getting Mr. Feeley's liability along with that of the company, and when he was asked if he looked to Feeley for it, or did he expect the liability of the company, he said he expected the liability of the company. He expected the company was bound by the receipt; he did not expect Feeley to guarantee the note only as one of the company; that he expected Feeley had power to bind the company to carry the transaction out; he charged the note when he paid it to the company; he proposed at a meeting of the shareholders after he had paid

the note, when Roach a member said he would foreclose a mortgage against the company, to give up all claim against the company. The defendant said the plaintiff did not ask him, the defendant, for any personal guarantee; he asked if the company would take up the note; he did not ask the defendant to take it up.

That evidence proves that branch of the plea. The real question should be determined on a motion to arrest the judgment, whether the plea shews a sufficient defence.

I do not think the question arises here whether the plaintiff was a shareholder or not before he elected to give up his share. I think he was, and that would be an important matter between him and a creditor of the company. The defendant could agree with him, if he liked, to pay the plaintiff back the money for his share in the event of the plaintiff giving it up by a day agreed upon between them, as that would not, and could not, prejudice any of the creditors of the company.

The defence at present pleaded is not, I think, a valid defence. It is, however, in my opinion, proved.

The plaintiff should have judgment arrested if the verdict be entered for the defendant. Then the question is, whether, as an answer to such a motion, the defendant should be allowed to amend his pleading if he can do so.

Defendant to have leave to amend his pleadings, if advised, on payment of costs in two weeks. If he do not amend, the rule to be absolute to enter a verdict for him on the second branch of the plea; and plaintiff to be allowed time to make a motion to arrest the judgment, or such other motion as he may be advised.

HARRISON, C. J., and MORRISON, J., concurred.

*Rule accordingly.*

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## FENTON V. MCWAIN.

*Tax sale—32 Vic. c. 36, O.—Omission to return list under sec. 110—Effect of secs. 130, 155.*

Land was sold in January, 1871, for an arrear of taxes assessed in 1867, under a warrant for sale, dated 20th August, 1870. The land was put on the non-resident in place of the resident roll, and the list of land liable to be sold, required by the 32 Vic. ch. 36, sec. 128, O., to be sealed with the corporate seal and signed by the warden, and to be returned to the treasurer with the warrant for sale annexed, was not so sealed or signed or returned. *Held*, that the land could be sold under the 32 Vic. ch. 36, sec. 128, at any time after the taxes had been due for more than three years at the time of the warrant, as they were here; and that the placing the land on the wrong list, and the omission to authenticate and return the list, were defects cured by sec. 155—more than two years having elapsed before this suit since the execution of the tax deed.

No list was returned by the treasurer to the clerk of the land on which three years' taxes were in arrear as required by sec. 110; and sec. 131 enacts that the treasurer shall not sell any lands which have not been included in such lists. *Held*, therefore, that the sale in this case was unauthorized, and that it was not made valid by secs. 130 or 155.

EJECTMENT for 10 acres of lot 3 in the 3rd concession of the township of Uxbridge.

The plaintiff claimed through a person deriving title from William McKay, the purchaser of tax lands, who got a deed from William Henry Gibbs, warden of the county of Ontario, and William Paxton the younger, the treasurer of the said county, dated the 16th March, 1872, of the land in question.

The defendant denied the plaintiff's title, and asserted title in himself by a deed from one Sangster, dated 3rd November, 1858, and also by length of possession in himself and those under whom he claimed.

The cause was tried at Whitby, at the last Spring Assizes, before Burton, J.

*William Laing*, the treasurer of the county, produced the non-resident roll of Uxbridge for 1867. The land was described on it as the S. W. part of the E. half of 3 in the 3rd concession, containing ten acres of the value of \$100. There was then returned as due upon it \$2.14 for taxes. The warrant for sale was produced, and the schedule of land to be sold was attached to it. The land was described in the

schedule as the S. W. part of E. half of 3 in the 3rd concession, 10 acres, 1867, taxes \$2.79, costs 75c., total \$3.54. There was nothing to indicate that the list was ever attached to the warrant, or in the warden's possession.

*E. H. Hilbourne*, township clerk of Uxbridge, produced the original non-resident roll, certified by the assessor. It contains the resident and non-resident lands. This land was described as the S. W. part of E. half 3, 3rd concession, Uxbridge, 10 acres. He said the defendant told him he was the owner of the property with other two portions of land, one portion being 25 acres of the same lot, in 1867, but it was under lease to a tenant whom he expected to pay the taxes. He, witness, searched to find if the roll of 1867 was ever returned to the township under 29-30 Vic. ch. 53, sec. 114, and was unable to find it; he believed it was not returned. The taxes on the 10 acres in question appeared by the books to be due when the land was sold.

*David Walks* was assessor of Uxbridge in 1867. The land was described as S. W. part E. half 3, 3rd concession, 10 acres. The reputed owner was the defendant. His name was not on the resident roll. There were no buildings on the ten acres, nor any one living on them in any part of 1866 or 1867. He also said: I saw *McWain* before I entered the land on the non-resident roll. I told him I found no one on his land. I asked him whether I should assess him, as the tenant was leaving the land or had left. He said no, he would not be assessed: there was another tenant coming on, and it should be assessed to him. I called upon the tenant he spoke of—*Thomas Smith*. He was not on the lot, and he said he did not think he would go on, and refused to be assessed. I did not see *McWain* after that. I then put the 10 acres and the 25 acres of the same lot, both belonging to *McWain*, on the non-resident list. *McWain* was a resident in the municipality. I did not go upon the land, but heard it was vacant. I did not tell *McWain* I had put his land on the non-resident roll.

The *Gazette* was put in. The advertisement contained the ten acres described as in the schedule. The taxes were stated



to be \$2.79, expenses \$1.05, total \$3.84. The sale was for the 13th January. Advertisements in the "Whitby Chronicle" were also put in.

The plaintiff said he was present at the sale, and bought the ten acres for James Watson.

For the defence: *Francis Irvine Jordan* said: I live in Uxbridge: have known McWain fifteen years. I occupied the middle part of the west half: have occupied it since 1866. Thomas Brown occupied McWain's land in 1866, William and Thomas Smith in 1867, and Calvin Miller and defendant since. The tenants were not at home the day Walks, the assessor, came round. He spoke to me. I told him they were moving on the place: that they had commenced moving on about a week before. It has been occupied ever since. I knew McWain owned it. I am prepared to swear that they were actually on the place at the time. I heard of the 10 acres being sold for taxes: heard of it three or four years ago. McWain would not believe it had been sold when he first heard it.

*Alexander McWain*, defendant: I have lived in Uxbridge 30 years on this land. Thomas Brown, William Smith, and Calvin Miller were tenants at different times; heard about four years since that that land was sold for taxes; think I was in possession in 1867, the year after the taxes were unpaid. Miller and I had it on shares; Smith was there three years before Miller and I had it; I worked for Stapleton in 1867; I never told any assessor not to assess my land to me in 1867; I was never called upon for taxes in 1867; Calvin Miller said he went on to this land in 1868; was on it for five years; no claim was ever made on him for the taxes of 1867.

After hearing counsel the learned Judge said: I find that the land was not at the time of assessment unoccupied land, but that it was then in the possession of a tenant, and that the owner was resident within the municipality to the knowledge of the assessor; that no roll certified as the statute requires was furnished by the township clerk to the treasurer; that the list required under the Act of 1866, sec. 129, was not

authenticated by the signature of the warden and the seal of the corporation; nor was the same annexed to the warrant under which this land was sold. No further description than appears in my notes was given of the land sold and no further description given until after the sale; the purchaser admitting that he had no knowledge of the land which was then sold by the description then given of it as the south-west part of the east half of three in the third concession Uxbridge, ten acres. The treasurer afterwards obtained a description of the ten acres from the registry office and filled up the certificate he gave in that way, and the deed followed the certificate. I find that no lists were returned to the clerk under section 111 of the Act of 1866, or section 110 of the Act of 1869; nor furnished to the treasurer under section 131 of that Act, or section 132 of the Act of 1866. Under these circumstances I find in favour of the defendant, with leave to the plaintiff to move to enter a verdict for him, if the Court is of opinion that the defects are cured by the 32 Vic. ch. 36, sec. 155. It is quite possible that under the Acts validating this kind of title, the plaintiff may be able to recover. Upon the hasty consideration of the case which one is enabled to give to such a matter at *Nisi Prius*, I am unwilling to believe that peoples' rights can be thus rudely trampled on; and as the matter requires a thorough argument and full consideration, I enter the verdict for defendant.

During this term, May 23, 1877, *Robertson*, Q. C., obtained a rule *nisi* to enter the verdict for the plaintiff.

In the same term, June 7, 1877, *M. C. Cameron*, Q. C., shewed cause. The land was sold for an arrear of taxes said to have been assessed in 1867. That assessment was made under the Act of 1866, which Act did not authorize a sale of the land to be made for non-payment of the taxes until they were in arrear for five years. The warrant for sale was dated on the 20th August, 1870, and the sale of the

land was on the 13th January, 1871, at which time the taxes had not been in arrear for five years. The sale was under the Act of 1869, 32 Vic. ch. 36, which permitted a sale of lands, on which taxes were due, to be made if such arrears were due for three years. The owner of the land was, therefore, entitled to three years from the passing of that last Act before his land for the arrears of 1867 could be sold, and the land was sold long before that time. That is, the party was entitled to three years from the passing of that last Act, if that time would not be more than the five years which the defendant had under the former Act of 1866. The land should not have been assessed on the non-resident roll as it was, for it was occupied at the time to the knowledge of the assessor, and the owner of it was known to him also and was a resident of the township. The Act of 1866 secs. 22, 24, 25, provided the manner for assessing lands if occupied, or if unoccupied. The 32 Vic. ch. 36, sec. 128, requires that lands liable to be sold for arrears of taxes shall be put in a list, and the list in duplicate shall be delivered to the warden, who shall authenticate the same by affixing the corporate seal and his signature thereto, and one of such lists shall be deposited with the clerk of the county, and the other shall be returned to the treasurer with a warrant thereto annexed, under the hand of the warden and the seal of the county, commanding him to levy upon the land for the arrears due thereon with his costs. Here no such list, if delivered to the warden, was ever signed by him or sealed with the county seal, or annexed to the warrant. By sec. 131 of the same Act the treasurer is not to sell lands for arrears of taxes unless they have been included in the lists furnished by him to the clerks of the different municipalities in the month of February preceding the sale, nor the lands which have been returned to him as unoccupied under sec. 114, except the lands the arrears for which had been placed on the collection roll of the preceding year, and again returned unpaid and still in arrear for want of sufficient distress being found on the lands. That

course was not pursued. The 155th section cures and was intended to cure many defects in the course of assessing and dealing with lands in respect of taxes, and of proceeding to sell and selling them, but it does not apply to such defects as are shewn to have prevailed here: *Hutchinson v. Collier*, 27 C. P. 249; *Jones v. Cowden*, 34 U. C. R. 345, in Appeal, 36 U. C. R. 495; *Har. Mun. Man.*, 3rd ed., 656.

*Robertson*, Q. C., supported the rule. The question depends upon the effect to be given to 32 Vic. ch. 36, sec. 155, O. The two years time allowed to the owner of the land, within which he may dispute the validity and regularity of the sale, are to be computed from the time of the giving of the deed to the tax purchaser: *Hutchinson v. Collier*, 27 C. P. 249. The plaintiff's tax deed was made on the 13th of March, 1872, and the action was not begun till 1876. As to assessing the land as that of a non-resident in place of that of a resident, the evidence shewed the assessor wanted to assess the defendant for the land, but he did not want it done as there was a tenant just going on to it, and he should pay the taxes. The irregularity therefore was that of the defendant himself, who cannot now complain of it. The non-resident roll for 1867 was in the same book as the resident roll, and the resident roll had on its back a certificate according to sec. 93 of the Act of 1866, and that would apply to both rolls. The list of lands including the land for sale was not signed or sealed or annexed to the warrant for sale, but the list was with the warrant, and the warrant was produced, which frees the case from the objection that was taken in *Hutchinson v. Collier*, 27 C. P. 249. It is said the ten acres sued for are not well described in the assessment roll, or in the list made for sale, or in the advertisements, by the designation of the "W. part of E.  $\frac{1}{2}$  of 3 in 3 concession of Uxbridge, 10 acres." That is a good description. By the 32 Vic. ch. 36, sec. 138, the particular piece of land sold need not be described at the sale. The defendant owned the west half of the



lot, and these ten acres of the east half: *Ley v. Wright*, 27 C. P. 522; *Williams v. McColl*, 23 C. P. 189.

June 30, 1877. WILSON, J.—I am of opinion the sale of this land could be made under the 32 Vic. ch. 36, sec. 128, O., at any time after the taxes on the land had been due for more than three years at the time of the warrant, as they certainly were in this case; and I am of opinion that land put on the non-resident in place of the resident roll may be sold, and that the list of lands in arrear liable to be sold which has not been authenticated by the seal of the county and the signature of the warden, and which has not been annexed to the warrant under sec. 128 of the 32 Vic. ch. 36 are defects and irregularities which are cured by the 155th section of the last named Act in this case, because more than two years had elapsed before the commencement of this suit since a deed was made of the land sold for taxes to the tax purchaser, and the taxes in fact were proved to be in arrear.

The reason I think the entry on the non-resident roll in place of the resident roll is a curable defect is, that although it was wrongly or improperly so entered, the owner of the land could on the return of the roll complain of having been wrongfully omitted from the roll, that is, the resident roll—Assessment Act of 1866 sec. 61, sub-sec. 1—and have had it corrected, and the roll as finally passed is to be valid and binding on all parties concerned. And it is not too much to hold the defendant to an assessment he could have appealed from, but did not, bound by it, as the roll is final, as respects a purchaser in good faith who could not be expected to know anything of such matters. He was allowed two years to object to the validity of the sale; that period of limitation must be conclusive upon him as to this objection. He has not much reason to complain of being so assessed because there is evidence to shew that he did not want to be assessed, and although the assessor should nevertheless have assessed him he is to blame for not being assessed, and may be said to be partly to blame for the land being assessed

as it was. He knew however it was assessed in fact, and it was his place to see that the taxes were paid. He knew, too, within two years from the date of the deed to the tax purchaser that the land had been sold for arrears, and he took no means to question the sale before any Court of competent jurisdiction.

I will refer to the sections applicable to this point, and I will take the 32 Vic. ch. 36, because it was the one that was in force for more than two years before this sale was made, and because the enactments of the Act of 1866 are just alike on this subject with those of the later Act.

The general scheme of procedure anterior to any sale of lands for arrears of taxes seems to be as follows: —

By 32 Vic. ch. 36, sec. 110, the treasurer of the county furnishes to the clerk of each municipality in the county, except in cities and towns, “a list of all the lands in his municipality” liable to be sold, and the list shall be headed as before mentioned.

By section 111, the clerk shall keep that list for inspection, and he shall deliver to the assessor a copy of it.

By the same section the assessor is to ascertain if the lands are occupied or are incorrectly described, and to notify such occupants and also the owners if known “upon their respective assessment notices, that the land is liable to be sold for arrears of taxes.”

By sec. 113, the clerk is then to correct and amend the list he got from the treasurer of the county by the assessment roll, and to furnish a list to the treasurer of such lands which appear on the resident roll as having become occupied, or which the assessor has returned as incorrectly described.

By the same section, the treasurer then returns to the clerk of each municipality “an account of all arrears of taxes due in respect of such occupied land.”

By the same section, the clerk is to add on the collector's roll such arrears of taxes to the taxes assessed against such occupied lands for the current year, and the whole shall be collected.

By sec. 128 the treasurer, having got the warrant and authenticated list of lands liable to be sold for taxes, is to sell the same.

But by sec. 131 he is not to sell any lands which have not been included in the lists furnished by him to the clerks of the several municipalities as before mentioned; nor any lands which have been returned to him as being occupied under sec. 114, except the lands, arrears for which had been placed in the collection roll of the preceding year, and again returned as still in arrear.

The list which the county treasurer should send to the clerks is of very great importance, because it informs clerks of the lands which are liable to be sold for taxes in the year therein mentioned, and which list is to be filed and kept for public inspection, and because the assessor who is to get a copy of it is to notify the parties, owners or occupants, if known, that the land is liable to be sold for such arrears.

It was found here that there was no such list furnished by the county treasurer to the clerk of the municipality. Then can the treasurer sell any land which should have been on such list, when the statute says he shall not? I think he cannot. If there had been such a list, and this land had not been on it, I should say he could not sell it, and certainly he cannot be entitled to sell it when there is no such list at all. Can the sale then be protected by secs. 130 and 155 of the 32 Vic. ch. 36?

The first of these sections declares that "if any tax in respect to any lands sold by the treasurer after the passing of this Act, in pursuance of and under the authority thereof, shall have been due for the third year or more years preceding the sale thereof, and the same shall not be redeemed in one year after the said sale, such sale and the official deed to the purchaser of any such lands (provided the sale shall be openly and fairly conducted) shall be final and binding upon the former owners of the said lands, and upon all persons claiming by, through or under them, it being intended by this Act that all owners of land shall be

required to pay the arrears of taxes due thereon within the period of three years, or redeem the same within one year after the treasurer's sale thereof."

And sec. 155 declares that "whenever lands have been or may be hereafter sold for arrears of taxes, and the sheriff or the treasurer \* \* shall have given a deed for the same, such deed shall be, to all intents and purposes, valid and binding, except as against the Crown, if the same has not been questioned before some Court of competent jurisdiction, by some person interested in the land so sold, within two years after the passing of this Act, when the land was sold, and a deed given \* \* before the passing of this Act, or within two years from the time of sale, when such sale shall take place after the passing of this Act."

It cannot properly be said the land was sold according to the 130th section of the Act "in pursuance of and under the authority thereof," when the Act declared that "the treasurer shall not sell any lands which have not been included in the lists furnished by him to the clerks of the several municipalities," &c.

Then is the sale protected by section 155? I think it is not. The land was not under the statute "sold for arrears of taxes," because it was not land which could be sold for taxes. It was no more land sold for taxes than if it had not been included in the list of lands to be sold which was attached to the warrant to sell.

If the warrant or schedule attached to it did not specify a particular lot to be sold for arrears of taxes, but it was nevertheless sold for such arrears and a deed made of it, it might be said in one sense that the land was sold for taxes, because it was in fact sold and a deed made of the land as so sold. But it is manifest that there would be the entire absence of all authority to sell it, yet not more so than when the statute declares expressly that certain lands shall not be sold. So it is quite clear that land sold for taxes when no taxes are due may in a sense be said to have been sold for taxes in arrear, because such a sale did



take place. Yet no taxes being due in fact the foundation for the sale is wanting.

It is not necessary to refer to the description of the land. It is very probable we should have thought it sufficiently definite.

We think the plaintiff must fail upon the objection taken at the trial that it was not shewn there had been any list furnished by the county treasurer to the clerk of the township of Uxbridge under the 32 Vic. ch. 36 sec. 110, and that being so he had no authority by sec. 131 to sell the land in question.

In my opinion the rule should be discharged.

HARRISON, C. J., and MORRISON, J., concurred.

*Rule discharged.*

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WRITT V. SHARMAN ET AL.

*Lease—Construction—Allowance out of rent.*

The plaintiff leased a tavern to defendant for three years at a rent of \$400 a year, payable quarterly, "the said lessor to allow the said lessee the amount he has to pay as license fees out of the first quarter's rent in each year." The license fee when the lease was executed, and for some years previously, was \$85; but in the following year it was raised to \$200. *Held*, that the lessee could claim no allowance beyond the first quarter's rent, the lessor being bound to allow the fee only provided it did not exceed such rent.

REPLEVIN. Defendant Sharman avowed, and the other defendant acknowledged, the distress of the plaintiff's goods for rent in arrear.

Replication denying that the rent was in arrear.

Issue.

The cause was tried before Galt, J., without a jury, at the last Spring Assizes, at Stratford, when a verdict was found for defendants.

The lease was made on the 1st of March, 1875, and was for three years from the date. The rent reserved was \$400 per annum, clear, and without any deduction or abatement whatsoever, payable quarterly, on the first days of June, September, December, and March, in each year, the first payment to be made on the 1st of June, 1875. The lease contained this covenant by the lessor:—"The said lessor to allow the said lessee the amount he has to pay as license fees out of the first quarter's rent in each year."

At the making of the lease, and for some years before, the tavern license fee was \$85. The plaintiff used the premises for a tavern. In 1876 the fee was increased to \$200. The plaintiff paid the \$200 for 1876. The defendant Sharman was willing to allow the whole of the first quarter's rent to go towards the license fee.

The plaintiff claimed that after exhausting the first quarter's rent, or \$100, he was at liberty to deduct the remaining \$100 of the fee from the next accruing rent. Sharman disputed that right.

Sharman distrained for the rent which fell due after allowing the first quarter's rent only for the license fee, and the plaintiff replevied, claiming that no rent was due, because he had the right to apply the \$100 the landlord distrained for in satisfaction of the residue of the tavern license fee.

This was the only question in dispute.

In Easter term, May 22, 1877, *Robinson*, Q. C., obtained a rule calling on the defendants to shew cause why the verdict should not be set aside, and a verdict entered for the plaintiff.

June 7, 1877. *M. C. Cameron*, Q. C., shewed cause. He cited *Cornock v. Dodds*, 32 U. C. R. 625; *Peacey v. Ovas*, 26 C. P. 464; *Mayor, &c., of Berwick upon Tweed v. Oswald*, 3 E. & B. 653, 664; *Davis v. Gyde*, 2 A. & E. 623.

*Robinson*, Q. C., supported the rule. That one will allow so much money to another is an agreement to pay it: *Chapman v. Bluck*, 4 Bing. N. C. 187; *Bain v. Kirk*,

18 L. J. Q. B. 83; *Sunderland Marine Ins. Co. v. Kearney*, 20 L. J. Q. B. 417, 16 Q. B. 925; *Pilbrow v. Pilbrow's Atmospheric, R. W., &c., Co.*, 5 C. B. 440; *Platt on Leases*, vol. ii. 147; *Dallman v. King*, 4 Bing. N. C. 105; *Add. Cont.*, 7th ed., 168.

June 30, 1877 WILSON, J.—It should be mentioned that there is a surety to this lease for the due performance of covenants by the tenant.

In *Pilbrow v. Pilbrow's Atmospheric, R. W., &c., Co.*, 5 C. B. 440, the action was against a joint stock company, incorporated by virtue of the Joint Stock Companies' Act. They covenanted to pay the plaintiff £15,000 out of the money raised by the first instalments or calls on shares of the company, and the breach was, that although instalments or calls on shares were paid to the company before the commencement of the suit, out of which the plaintiffs might have paid the £15,000, and although a reasonable time for payment of the same had elapsed since the payment to the company of the same, yet the company had not paid the same.

Wilde, C. J., said, p. 469: "The question sought to be raised is, what is the effect of that covenant. Whether the company engage to pay the £15,000 at all events, or whether a liability is created which is only to attach after the money has actually been raised; \* \* whether it means money already raised, or money to be raised in future?" And at p. 470: "I am of opinion that this was an absolute covenant on the part of the company, to pay the £15,000 out of money raised by the first calls—that is, that it was a covenant which became absolute by the fact, that the company might have raised the money, and did not."

Maule, J., said, p. 472: "It is put, on the part of the defendants, as a condition precedent to their liability to pay the £15,000, that there should be funds in their hands, arising from calls on shares, sufficient for that purpose. The true sense of the covenant, however, as it seems to me, is, that it is a simple covenant to pay. It is true, it

points out the fund out of which payment shall be made; but it does not make the raising of that fund a condition precedent to the liability of the defendants." See also *Scott v. Lord Ebury*, L. R. 2 C. P. 255.

In *Sunderland Marine Ins. Co. v. Kearney*, 16 Q. B. 925, the policy was, "Provided, nevertheless, that the capital stock and funds of the said company should alone be liable \* \* to answer and make good all claims and demands whatsoever, under and by virtue of the said policy; and that no shareholder of the said company \* \* should be in anywise subject or liable to any claims or demands, \* \* by reason of the policy, \* \* beyond the amount of his shares." Held, that as the defendants were a corporation, it was only the capital stock and funds of the company that could be liable, and the covenant was therefore absolute to pay the sum claimed, for a creditor can have no claim except upon the stock and funds of the corporation.

In *Hallett v. Dowdall*, 18 Q. B. 2, a policy worded like the one in the preceding case, and entered into by five of the company for the company, not by deed, was held to be binding on the parties only if there were funds sufficient of the company: *Halket v. The Merchant Traders', &c., Ins. Co.*, 13 Q. B. 960; *Reid v. Allan*, 4 Ex. 326; *Dawson v. Wrench*, 3 Ex. 359.

These words have been "construed as a proviso upon the general contract to indemnify, which must, therefore, be read, that the company undertake to indemnify against the risks enumerated, provided the capital stock and funds are sufficient for that purpose." Per Cresswell, J., in *Hallett v. Dowdall*, 18 Q. B. 2, at p. 77.

Or, as Parke, B., expressed it in *Gurney v. Rawlins*, 2 M. & W. 87, at p. 90: "The defendants undertake by an instrument under seal that this sum of money shall be paid if the funds prove adequate; therefore it is equivalent to a covenant to pay if J. S. go to Rome." See also *King v. The Accumulative Life Fund, &c., Ins. Co.*, 3 C. B. N. S. 151, 168, and *Churchward v. The Queen*, 6 B. & S.



807, where payment was to be made "out of moneys to be provided by Parliament."

In this case neither party supposed that the license fee would, during the lease, ever exceed a quarter's rent or \$100.

The covenant is absolute that the license fee shall be allowed, but the words "out of the first quarter's rent in each year," operate in this manner, *provided the said fee does not exceed the first quarter's rent.*

The words "out of," &c., cannot be rejected. They were inserted for the purpose as well of limiting the liability of the lessor, as of affording a benefit to the lessee.

In my opinion the rule should be discharged.

HARRISON, C.J., and MORRISON, J., concurred.

*Rule discharged.*

# IN THE MATTER OF JOSHUA S. HAMILTON AND THE CORPORATION OF THE COUNTY OF BRANT.

*Temperance Act of 1864—Notice of taking the poll—Number of days polling.*

It is not necessary that the notice of taking a poll to decide upon a by-law under the Temperance Act of 1864, should state the number of days during which the poll will be kept open.

The number of days polling must be decided by the number of names of qualified municipal electors upon the roll. All those on the roll who are not qualified, such as minors, women, &c., must be excluded.

April 27, 1877. *H. J. Scott* obtained a rule *nisi* returnable before the full Court, calling on the Corporation of the County of Brant to shew cause why by-law No. 99, of the said corporation, to prohibit the sale of intoxicating liquors within the county of Brant, should not be quashed with costs, upon the following among other grounds:—

1. That the notice published throughout the said county of the holding of the meeting of the electors of the various municipalities throughout the county, for the purpose of taking the poll to decide whether or not the said by-law

should be approved or adopted, was defective in not stating the number of days during which the said poll would be open in the various municipalities.

2. That the said poll for the taking of the votes of the electors upon the said by-law in the municipalities of the town of Paris, and of the township of Burford, was in each of the said municipalities closed one day too soon.

The by-law was passed by the council of the county on 8th January, 1876, under authority, and for enforcement of the Temperance Act of 1864, and was submitted to the vote of the electors on Tuesday, 16th January, 1877, at the hour of ten o'clock in the forenoon, and was carried by a majority of 260 on the poll for the whole county.

Subjoined to the copy of the by-law, as published, was the following :

“NOTICE.

“The above is a true copy of a by-law passed by the Municipal Council of the County of Brant, on the 8th day of December, 1876, and at the time of the passing thereof ordered to be submitted for approval to the municipal electors of the municipality, pursuant to the Temperance Act of 1864.

“A meeting of the electors of each municipality in the said County of Brant, will be held on Tuesday, 16th January, 1877, at the hour of ten o'clock in the forenoon, at the respective places undermentioned, for the taking of a poll to decide whether or not the said by-law is approved of by such electors—that is to say :

“In the town of Paris, at the Engine House \* \* \*

“In the township of Burford, at the house of Mr. Sweezy.

(And so on as to the remaining local municipalities in the county), and “of the foregoing all persons interested therein will take notice and govern themselves accordingly.

“Dated at the Town of Brantford, this 9th day of December, A.D., 1876.

“(Signed.)

HUGH MCKENZIE WILSON,  
“Clerk, County of Brant.”

The vote for and against the by-law was as follows :

	Yeas.	Nays.	Total.
Town of Brantford .....	488	714	1202
Town of Paris.....	180	195	375
Township of Brantford.. ...	459	468	927
Township of Burford.....	457	226	683
Township of South Dum- fries.....	266	117	383
Township of Onondaga.....	114	94	208
Township of Oakland.....	125	15	140
	<hr/> 2089	<hr/> 1829	<hr/> 3918

Majority for the by-law..... 260.

The poll was kept open in the town of Paris for only two days, whereas it was argued that it should have been kept open in that municipality for at least three days.

The number of names on the roll for Paris was 1233 ; but the number of duly qualified electors whose names were on the roll was only 562.

The poll was kept open in the township of Burford for three days, whereas it was argued that it should have been kept open in that municipality for at least four days.

It was admitted that in the township of Burford, as in Paris, the total number of names on the roll was much more than the number of names of qualified voters on the roll, and sufficient to entitle the electors of that township to a third day's polling, if the total number of names must govern and be held conclusive without a scrutiny of any kind as to the actual names of qualified voters.

During this term, June 5, 1877, *R. C. Smith* shewed cause. Under 27-28 Vic. ch. 18, sec. 5 subsec. 6, the rolls are not conclusive as to the names of qualified voters, and none but the names of qualified voters could be considered in deciding as to the number of days for voting. The notice of the polling was sufficient.

*Robinson, Q. C. (Scott with him).* The object of the Act is to prescribe the number of days polling by a rule

which all can understand on inspection of the rolls, and it must be determined by the number of apparently qualified electors to be found there. The contention on the other side would leave the duration of the poll uncertain, and dependent entirely upon the discretion of the returning officer, to be controlled only by a subsequent scrutiny. An elector might examine the roll, and finding 401 or 420 names apparently qualified, would assume that there would be two days polling, and might wait for the second day; but the returning officer, knowing or believing that one or twenty of these names represented minors or women, or were repetitions of the same name, might close the poll on the first day. He might even acquire this information towards the end of the first day and act upon it, though he had previously intended and thought it necessary to allow another day. It would thus be unknown until the last moment how long the polling is to continue, for the returning officer is not bound to make this known, and the notice, it has been decided in *Re Malone and the Corporation of the County of Grey*, 41 U. C. R. 159, need not state it. Such a construction could never have been intended, and would work great injustice, nor is it required by the Act, which may fairly mean the number of qualified electors appearing on the roll, and to be ascertained by inspection of it. In this case it was shewn that the result may have been affected by not allowing more time: *People v. Cook*, 14 Barb. 250, 295, 296. *Dillon*, on Municipal Corporations, 2nd ed., sec. 136, note. *Cushing* on Legislative Assemblies, sec 203, *et seq.* *Rogers* on Elections, 10th ed., 281. *Re Johnston and The Corporation of the County of Lambton*, 40 U. C. R. 297; *Regina ex rel. Hart v. Lindsay*, 18 U. C. R. 51; Municipal Institutions' Act 1873, sec. 77.

June 30, 1877, HARRISON, C. J.—The sufficiency of the objections to the by-law moved against must be decided according to the interpretation to be placed on the statute, 27–28 Vic. ch. 18, under which the by-law was passed.



The statute not only provides for the submission of such a by-law to popular vote and the effect of the by-law when approved, but gives the machinery deemed necessary by the Legislature for ascertaining the will of the electors.

We have no power to add to or take from the machinery which the Legislature has provided. Our business is not to legislate, but to declare the meaning of the language of the Legislature.

The statute by section 5 provides for the publication by the municipal clerk of the proposed by-law for four consecutive weeks, "with a notice signed by him signifying that on some day within the week next after such four weeks, at the hour of ten o'clock in the forenoon, and at some convenient place (or if the by-law is for a county, places) named in the notice, a meeting of the municipal electors of the municipality, (or if the by-law is for a county then for each municipality in the county) will be held for the taking of a poll to decide whether or not the by-law is approved or is adopted (as the case may be) by such electors.

The notice published with the by-law now moved against contains every word by this enactment made necessary, but it is argued that it should contain something more, that is to say, the duration of the meeting; in other words, the number of days polling by the law provided under particular circumstances differing in different municipalities.

The answer is, that while such information would be highly desirable and most convenient, the Legislature has not as yet thought it either necessary or expedient, and so has made no provision for it.

This was the point decided by me recently in *Re Malone and the Corporation of the County of Grey*, 41 U. C. R. 159, and both of my learned brothers in this Court concur in the correctness of that decision.

But this was not so much pressed in this case as the point that the number of names on the roll, whether electors or not, must govern, and the aggregate number on the roll be deemed conclusive for the purpose of deciding

as to the number of days voting in any particular municipality.

No person is allowed to vote unless he appear by the assessment roll to be a duly qualified municipal elector: Sub-sec. 4 of sec. 5 of the Act of 1864.

The electors of every municipality for which there is an assessment roll are the male freeholders thereof in their own right or the right of their wives, whether resident or not, and such of the residents therein for one month next before the election as then are or whose wives then are householders or tenants in the municipality, &c., all which electors must be rated on the last revised assessment roll for real property in the municipality held in their own right or in the right of their wives, as freeholders, householders, or tenants, at the values following:—

In townships, \$100; in incorporated villages, \$200; in towns, \$300; in cities, \$400: See 36 Vic. ch. 48, secs. 77, 78.

There are on almost every assessment roll the names of women, minors, and others who are not duly qualified voters. Besides, in cities, towns, and incorporated villages, the name of the same person owning several parcels of land in different parts of the municipality often appears several times on the roll, although having only one vote in respect of his several parcels of land.

The Act of 1864 provides that "if at any time after the opening of the poll one half hour elapses without a vote being offered the poll *may* be closed:" sec. 5 subsec. 5.

And subsec. 6 provides, that "Unless for that cause closed earlier, the poll *shall* be kept open till the hour of five in the afternoon of the day of the opening thereof, and no longer, *if the names* of the *qualified municipal electors* on the assessment rolls of the municipality are not more than four hundred in number, and until the like hour of the next day, Sundays and holidays excluded, *if such names* are more than four hundred and not more than eight hundred in number, and so on, allowing one additional day for *each additional four hundred names.*"

The names to be counted are not *all* the names on the

roll but *only* "the names of the qualified municipal electors." So long as the roll contains the names of others than qualified municipal electors, in the absence of words authorizing the counting of all the names on the roll, these latter must be excluded.

Confessedly this construction permits an element of uncertainty which ought not if possible to be allowed to exist, but the language used appears to be so clear, when closely examined, that we, as Judges, have no alternative.

It is not a good argument against such a construction to urge that it leaves it in the power of a partizan municipal clerk to increase or diminish the number of days polling, for the law presumes that every public officer will do his duty, and generally provides efficient measures of punishment for those who wilfully or negligently disregard their duty: *The People v. Cook*, 14 Barb. 259; *The People v. Koppelkom*, 16 Mich. 342.

The statute 22 Vic. ch. 99, sec. 67, of the late Province of Canada, declared that no deputy reeve should take his seat in a county council "until he has filed with the clerk of the county an affidavit or affirmation of the clerk or other person having the legal custody of the last revised assessment rolls for the municipality which he represents, that there appears upon such rolls *the names of at least five hundred resident freeholders and householders in the municipality.*"

It was never insisted that the effect of these words was to permit the counting of all the names on the roll, whether electors or not, for the purpose of the enactment, but only that the roll was conclusive as to the names of electors thereon. But even this argument failed: *Regina ex rel. Hart v. Lindsay*, 18 U. C. R. 51, 53. See further *Regina ex rel. McManus v. Ferguson*, 2 U. C. L. J. N. S. 19.

Similar language to that contained in sec. 67 of 22 Vic. ch. 99, will now be found in sections 63, 67 and 69 of the present Municipal Act 36 Vic. ch. 48. See *Har. Mun. Man.* sec. 68, notes *h. i.*

The rating of electors as to qualification on the roll is now made conclusive, and cannot be questioned either by any returning officer or on any application to set aside an election : *Ib.*, sec. 77, note *u*. But no statute declares that all the names on the roll, whether representing the names of qualified voters or not, shall be counted for the purpose of subsec. 6 of sec. 5 of the Act of 1864, or for any other purpose.

The rule *nisi* must be discharged with costs.

MORRISON, J., and WILSON, J., concurred.

*Rule discharged.*

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### BOLEY V. McLEAN.

*Consol. Stat. U. C. c. 93, secs. 6-8—Survey under.*

A surveyor employed by the Government, under Consol. Stat. U. C. ch. 93, secs. 6-8, to survey a concession line alleged not to have been run in the original survey, or to have been obliterated, instead of attempting to make a survey in accordance with those sections, satisfied himself that the original line could be found and endeavoured to retrace it.

*Held*, following *Tanner v. Bissell*, 21 U. C. R. 553, that such survey was not binding under the statute; and the Court, on the evidence given at the trial, affirmed the finding of the learned Judge, who tried the case without a jury, that the line so run was not in fact the same as the original line.

*Semble*, that in order to prove a survey which will be conclusive under the statute, the application by the County Council to the Government for such survey must be shewn.

TRESPASS *quare clausum fregit*, as to lot number ten in the fourth concession, western boundary, of the township of Raleigh, in the county of Kent, depasturing the same, &c.

Pleas, not guilty, and land not the plaintiff's.

Issue.

The cause was tried before Patterson, J. A., without a jury at the last assizes for the county of Kent.

The plaintiff was the owner of lot 10 in the fourth conces-

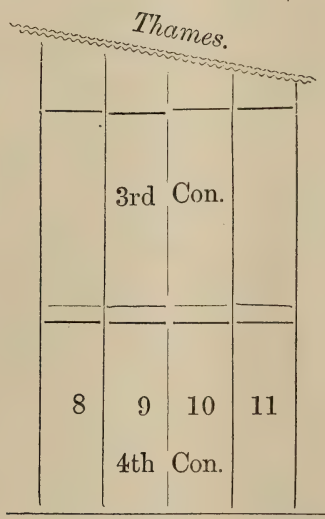


sion of the township of Raleigh, and defendant McLean of lot 10 in the third concession of the same township.

The question in dispute between the parties was, the situation of the road allowance between the two concessions.

The plaintiff, for a number of years, had his fence on what was supposed to be the line between the two concessions.

The following sketch shews the situation of the two lots.



In May, 1875, a survey was made under orders from the Crown Lands Department by Mr. McGeorge, a provincial land surveyor, according to which the concession line would be some distance north of the old fence.

The plaintiff moved his fence north according to McGeorge's survey, and ploughed up to it, but the defendant, a week or two afterwards, knocked down and removed the fence, and this was the trespass alleged.

The first survey was made by Iredell. He received instructions on 14th November, 1785, which were repeated and explained as to this part of the survey on 14th January,

1796. By these instructions he was to run a line S. W. at a tangent to the part of the river Thames, which broke most in upon the township. The line so run was to be the magisterial or governing line and the front of the first concession, and he was to make the first concession of the land between the river and that line. There were to be broken front concessions to be called A B C. The line then run was the line now in dispute, for the short concessions were numbered 1 2 and 3, in place of A B and C.

The line between lots 19 and 20 runs south from the river at the point where the magisterial line touches the river, and that line is the east boundary line of the survey in question. The western boundary line is the line between the townships of Raleigh and Tilbury.

Iredell's field notes of 1796 shew that he ran the line now in dispute all through from the side line between lots 19 and 20, called the line of the reserve, to the Tilbury line, and that starting at that line to run the line between the 4th and 5th concessions he was only able to run as far as the line between lots 14 and 13, when he was stopped by the water. He then ran in a south-easterly direction along the line between lots 14 and 13 the depth of a concession, and thence in a north-easterly direction along the line between the 5th and 6th concessions to the reserve, then running in a south-easterly direction along the reserve, the depth of another concession, he ran in a south-westerly direction the line between the 6th and 7th concessions as far as the side line, between lots 14 and 13, thus leaving only three concessions run as far as the west side of lot 14, these being the lines between the 4th and 5th, the 5th and 6th, and the 6th and 7th concessions. Iredell's diary in the Crown Lands Department shewed that in 1797 he completed the running of these lines from lot 14 to the Tilbury line. Iredell's map, dated in 1798 and 1799, shew all these lines run through to Tilbury.

Burwell, a land surveyor, was in 1821 instructed by the Government to complete the surveys of several townships, including Raleigh. He, acting under these instructions,

appears to have run again some of the lines previously run by Iredell. He also ran the line between the 4th and 5th concessions from the Tilbury line eastward as far as lot 8, when he was stopped by water. He ran one or two other concession lines south of that line, and to the same extent as that one. Thus there was a space left between lot 14 where Iredell stopped in 1796 in the concession lines between the 4th and 5th, the 5th and 6th, and 6th and 7th concessions, and lot 8 where Burwell stopped in 1822. If Iredell had not run out these lines as he appears to have done in 1797, that space would have been unsurveyed until McGeorge ran his line in 1873 or 1874.

The Government in April, 1873, instructed McGeorge to survey several concession lines, and amongst others the line in dispute. Burwell's field notes were forwarded to McGeorge along with his instructions. He was then informed, by a memorandum on the copy of Burwell's field notes of the line between the 4th and 5th concessions, that there were no field notes except those then sent. He was not informed of Iredell's survey of 1797. He was, therefore, governed in making his survey by that of Burwell, retracing the line Burwell had run from the Tilbury line to lot 8, and finding the point at which Burwell had stopped in 1796, and assuming the intervening distance to be unsurveyed, he ran a line from one point to the other. He in this way completed the line between the 4th and 5th concessions. But it was not a straight line. It consisted of three parts. Beginning at the Tilbury line, there was first the Burwell part from lot 1 to lot 8, then McGeorge's part from lot 8 to lot 13, and then Iredell's part from lot 13 to the reserve line between lots 19 and 20. He found no trace of the line between the 3rd and 4th concessions.

His mode of running the line was as follows: From the line between the 4th and 5th concessions he measured on the Tilbury line the distance of 66 chains 50 links, which was the depth intended in the original survey as the full depth of a concession, and took the point so formed as the starting point for the line between the 3rd and 4th conces-

sions. Then reasoning that the line between the 3rd and 4th concessions was the magisterial line, and therefore that the line between the 4th and 5th concessions ought to have been parallel to it, and never having found or run the line between the 3rd and 4th concessions, it must be right to let it govern the line between the 3rd and 4th concessions, and accordingly he ran the line between the 3rd and 4th concessions, following the irregularities of the line between the 4th and 5th concessions.

It was contended by the plaintiff that McGeorge's line was correct.

1. Because it was the original line.

2. Because, whether the original line or not, it was conclusive under the statute Consol. Stat. U. C. ch. 93, s. 8

The learned Judge found against both contentions, and rendered a verdict for the defendant; but if the Court should be of a different opinion, he assessed the damages to which the plaintiff was entitled at \$100.

His judgment was as follows (after stating the facts substantially as above set out):—

The result so far is, that I think the plaintiff fails to shew that the line run by McGeorge is the original line, and the defendant having *prima facie* title must succeed, unless the line is made conclusive by the statute. If conclusive as the indisputable line between the concessions, then, I think, the plaintiff has not lost his title by the effect of the Statute of Limitations.

The statute, Consol. Stat. U. C. ch. 93, contains in sections 1, 2, 3, and 5, the enactments of 38 Geo. III. ch. 1, and 58 Geo. III. ch. 14, which authorize the planting of stone monuments, or monuments of other durable material, at (amongst other places) the ends of concession lines which have been surveyed, and by which lines drawn from those monuments are made the true and permanent boundary lines. And sec. 6 contains the enactment which was first contained in 12 Vic. ch. 35, sec. 31, providing for running concession lines or parts of concession lines which were not run in the original survey, or which have been obliterated.

There are, therefore, provisions for two cases, viz: 1st. Where lines have been run and can be traced—they may be marked by permanent monuments: 2nd. When no line can be traced by reason of its never having been run, or having been obliterated, it may be surveyed and marked.



It was decided with respect to a survey of the township of Hamilton, made under instructions issued in 1846 (and before 12 Vic.), and under which instructions the surveyor had placed monuments to mark the lines which he traced (or decided when there were conflicting lines) as being the lines run on the original survey of 1798, that the work done by the surveyor and approved of by the Crown Lands Department was conclusive, and that the correctness of his decisions could not be questioned.

A judgment to that effect was prepared by the late Sir James Macaulay, when Chief Justice of the Common Pleas, in a case of *McCulloch v. Burnham*, but was not delivered because a statute was passed confirming the survey. Some years afterwards that statute was repealed, and the same question was raised in a case of *McArthur v. Vanderburgh*, in which the finding of the jury in *McCulloch v. Burnham* was by consent of parties adopted. The Court of Queen's Bench adopted the judgment of Sir James Macaulay, for the purpose of having the question argued in the Court of Appeal, and that Court in 1861 decided in favour of the conclusiveness of the survey under the force of the statute. There is no report of the judgment in *McArthur v. Vanderburgh*. I have before me a copy of that of Sir James Macaulay in *McCulloch v. Burnham*.

In the present case the instructions to McGeorge, the surveyor, were to *survey the line* between Gore A. and seventh concession; the line between the sixth and seventh; the line between the fifth and sixth concessions, and the line between the fourth and fifth concessions from the westerly boundary to the easterly line between lots 18 and 19; also, the line between the third and fourth concessions, second and third concessions, and first and second concessions from the easterly (a) town line to where they intersect the side roads in rear of the front lots in the township of Raleigh, and to plant durable monuments hereon.

The instructions are the usual printed instructions, containing *inter alia* the direction to make diligent search for and adhere to the lines drawn and posts planted in the original survey, or legally established by the Boundary Commissioners.

The surveyor reported that he had obtained evidence of the original survey, so far as it extended, from the southerly line of his survey to the line between the fourth and fifth concessions; and that the other two to the north of this he had run parallel to the line  $\frac{4}{5}$  making the third and fourth concessions the exact depth of 66 chains and 50 links, specified in the field notes of the original survey; and that he had throughout adhered to the original lines wherever traces of them could be found uniting points proved to have been in the original line, excepting in the case of the line between the second and third concessions, and the

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(a) Note by PATTERSON, J.—This is an error, as the town line is on the *west*.

line between the third and fourth concessions, in the survey of which two he had been guided entirely by the field notes of Mr. Burwell's survey of 1822. He reported also that he had run the line  $\frac{3}{4}$  from the westerly boundary to the line between lots 12 and 13.

It appears as well from the evidence of McGeorge, as from his report, that he found or satisfied himself that he found traces or evidence of some of the lines which he had to survey, but that the line  $\frac{3}{4}$  was entirely obliterated.

It would seem that his instructions if clearly authorized by the statute must be divisible, and relate as to some lines to the one and as to some to the other of the two cases which I have mentioned as being provided for by the statute.

I am not required to consider whether this is so or not, or whether a conclusive survey could be made under instructions such as these as applied to lines of these different characters.

As far as the line  $\frac{3}{4}$  is concerned, it is, I think, clear that the instructions can only be referred to the provisions of sec. 6, because that line was obliterated, and because the instructions are to survey and mark part of the line and not the whole, a power peculiar to sec. 6.

It is quite clear that the survey is not in compliance with sec 6 or sec. 7, which requires the lines to be so drawn as to leave each of the adjacent concessions of a depth proportionate to that intended in the original survey.

Instead of treating the line as one which did not exist, which is the case to which sec. 6 applies, and then surveying a line—a process which under the statute is to be exactly the same whether the line had never been run before or had been run and lost—he attempts in the mode already described to replace the line of the original survey. The case in this respect resembles *Tanner v. Bissell*, 21 U. C. R. 553, and on the authority of that case the survey must be held not conclusive.

I doubt, however, whether the case comes within the statute at all. The statute contemplates the case of two or more concessions between which no line exists. It assumes a known boundary on each side of the undivided tract, and directs the tract to be divided into concessions of a depth proportionate to that intended. In this original survey the line in question was to be the governing line from which the concessions each way were to be measured. The tract between the line and the river was to be laid out in concessions, which would, say on the Tilbury line, be of the full depth of 66 chains 50 links, until the last one, the size of which would be just what happened to be left. So that assuming the line  $\frac{4}{5}$  to be established as an original line there was no other fixed point between which and  $\frac{4}{5}$  the proportionate division could be made. The only thing to do was what the surveyor did, viz., to measure off the absolute depth intended; but that is not a mode of survey recognized by the statute.

During this term, June 2, 1877, *Douglas* obtained a rule calling on the defendant to shew cause why the verdict rendered for the defendant should not be set aside, and a verdict entered for the plaintiff for \$100 damages, on the ground that the verdict is contrary to law and evidence: that the burden of proof was not on the plaintiff, but the defendant; and that the plaintiff proved the only line that could be adopted as the original line if the McGeorge survey did not govern, and the line being obliterated the survey of McGeorge is binding.

During the same term, June 7, 1877, *C. Robinson*, Q. C., shewed cause. There was no proof of the preliminaries made necessary for the application of Consol. Stat. U. C. ch. 93, to McGeorge's survey, and if that statute were applicable, the survey was not such as the statute required. He referred to Consol. Stat. U. C. ch. 93, secs. 6, 8, 11, 14: *Tanner v. Bissell*, 21 U. C. R. 553; *Re Fairbairn and the Corporation of the Township of Sandwich East*, 32 U. C. R. 573. It was not shewn to be the original line.

*Douglas*, contra. The survey of McGeorge having been directed by the Government, all preliminaries required by the statute must be presumed, and if so the survey was in compliance with the statute; but whether or not, it was according to the original line of survey, and therefore should prevail.

June 30, 1877. HARRISON, C. J.—We are of opinion that the finding of the learned Judge who tried this cause ought not to be disturbed.

The fence, which the plaintiff removed on the supposition that the McGeorge survey was the correct one, was a fence which for a number of years had been allowed to exist in the belief that it was on the true line. The plaintiff was the first to disturb the possession which had been held according to that fence. It is for him, therefore, to prove that the old fence was erroneous. See *Wideman v. Bruel*, 7 C. P. 134; *Bernard v. Gibson*, 21 Grant 195.

This he undertook to do, first by proof that the McGeorge

line agrees with the original line, and that whether this is so or not, he argued, it is conclusive under the statute as being the permanent line to all intents and purposes.

The learned Judge, who tried the cause, after examining and carefully weighing the whole of the testimony on which the plaintiff relies to establish that the McGeorge line is in the situation of the old line, found against this contention, and we must say, notwithstanding some coincidences referred to by the learned Judge, the evidence fails to satisfy us that the old line did run where the McGeorge line does run.

The right of the plaintiff to recover therefore rests on the contention that the McGeorge survey, whether in the situation of the original line or not, must under the statute Consol. Stat. U. C. ch. 93 be held to be the permanent boundary line to all intents and purposes whatsoever.

All concession lines, and all boundary lines of concessions, made under the authority of the Executive Government of the late Province of Quebec, or of Upper Canada, or under the authority of the Executive Government of the late Province of Canada, are, so long as they can be traced or found, held to be the true and unalterable boundaries: Consol. Stat. U. C. ch. 93, sec. 14. But where not run in the original survey, or where obliterated, and consequent inconvenience to land owners arises, provision is made for a statutable survey of a particular kind, and the lines or parts of lines so surveyed are by the same statute declared to be thereafter "the permanent boundary lines of such concessions, or parts of concessions, to all intents and purposes of law whatsoever": Sec. 8.

The effect of these latter words may be (as intimated by Chief Justice Macaulay in *McCulloch v. Burnham*, the unreported case referred to by the learned Judge) to make the survey under the statute, when according to the statute conclusive even as against the subsequent discovery of the original boundaries; but it is unnecessary for us in this case to express any decided opinion on that point: *Taylor v. Croft*, 30 U. C. R. 573.



The learned Judge, who tried the cause, mentions that the judgment in *McCulloch v. Burnham* was never delivered by Chief Justice Macaulay, because a statute was passed confirming the survey then in question, and that some years afterwards that statute was repealed. He also mentions that the same question was afterwards raised in *McArthur v. Vanderburgh*, in which case the finding of the jury in *McCulloch v. Burnham* was by consent of the parties adopted: that the Court of Queen's Bench adopted the judgment of Sir James Macaulay for the purpose of having the question carried to the Court of Appeal; and that the Court of Appeal in 1861 confirmed the opinion of Sir James Macaulay, and decided in favour of the conclusiveness of the survey. But there is no report of the decision in appeal to be found.

From an early period in our history there have been difficulties, either because some of the concession lines, or parts of concession lines have not been run in the original surveys, or have become obliterated.

The Legislature of the late Province of Canada in 1849 assumed by 12 Vic. ch. 35, sec. 31, to deal with these difficulties by providing for a special survey or re-survey, as the case may be. This was affirmed by the Municipal Institutions Act, 22 Vic. ch. 99, sec. 258, and is now to be found in Consol. Stat. U. C. ch. 93, secs. 6 to 10 inclusive. See also Consol. Stat. U. C. ch. 77, secs. 58 to 62 inclusive.

The statute provides for the two cases.

1. Where the concession lines or parts of concession lines were not run in the original survey.
2. Where the concession lines or parts of concession lines have been obliterated.

The power of dealing with either of these cases is by the Legislature in the first instance vested in the county council of the county in which the particular township is situate where the land in dispute lies.

The county council may, on the application of one-half of the resident landholders in any concession, or without any such application, make application to the Governor, requesting him to cause any such line to be surveyed and

marked by permanent stone boundaries, under the direction and order of the commissioner of Crown lands *in the manner prescribed* in the Act, but at the cost of the proprietors of the lands in each concession or part of concession interested.

The manner of survey is apparently that the lines shall be so drawn as to leave each of the adjacent concessions of a depth proportionate to that intended in the original survey : Sec. 7.

Whether the statute can be applied to a case where the adjacent concessions are so situated as to render this mode of survey impossible was made a question in *Re Fairbairn and the Corporation of the Township of Sandwich East*, 32 U. C. R. 573:

But in the case now before us there was nothing in the situation of the adjacent concessions to prevent the mode of survey directed by the statute being carried out, and yet the mode of survey by Mr. McGeorge was a very different one, and for that reason the learned Judge held his survey not to be a survey under the statute.

It appears to us that McGeorge, instead of attempting to make a survey under the sections of the statute, which make the survey as it were conclusive, satisfied himself that the original line could be found, and endeavored simply to retrace it.

Such a survey is certainly not the mode of survey which is made permanent by the statute, and the learned Judge was, we think, right in so holding under the authority of *Tanner v. Bissell*, 21 U. C. R. 553.

Besides, in this case there was an entire *absence* of any proof of an application from the county council to the Government and other preliminaries made necessary under the statute to make the survey consequent thereon a binding survey. See *Cooper v. Wellbanks*, 14 C. P. 364; *Regina v. McGregor*, 19 C. P. 69.

If the Government had no power to appoint a surveyor except upon application from a county council, we might infer from the fact of the appointment that there was the

application. But we know the powers of the Government are not so limited.

Any surveyor may, without any authority other than the retainer of parties interested, endeavor to retrace an old line, but whether his survey is to be binding or not must depend on the success of his attempt as a question of evidence. So any surveyor employed by the Government to make a similar attempt may do so, but his survey, if nothing more be proved than a simple appointment by the Government, cannot have any conclusive effect.

It is only where the surveyor is appointed on application of the county council to make a survey of a concession line, or part of a concession, either not surveyed in the original survey or since obliterated, that lines run by him, and marked for the purposes of such a survey, shall be held permanent boundary lines "to all intents and purposes of law whatsoever."

There was not only the absence of any such proof in this case, but the fact was that the surveyor himself proceeded as if there never had been such an application or such an appointment under the statute.

The effect of a line run by a surveyor under these circumstances is in *Tanner v. Bissell*, 21 U. C. R. 553, described by Sir John B. Robinson as follows: "His line so run derives no decisive authority from the statute, but affords some support to whatever other testimony there was in favour of the defendant's line."

The learned Judge, who tried the cause, in this view, and in this view only, considered, and rightly considered, the survey, and was not satisfied, either by it or by the other evidence relied upon by the plaintiff, that Mr McGeorge had succeeded in finding the original line run by Iredell, and so found a verdict for the defendant.

The verdict is in our opinion the proper verdict on the evidence, and it cannot be said to be contrary either to law or evidence.

The rule *nisi* must be discharged.

MORRISON, J., and WILSON, J., concurred.

*Rule discharged.*

FRANCIS O'CALLAGHAN v. THOMAS COWAN, JOHN CHRISTOPHER, GEORGE CHRISTOPHER, AARON R. CHRISTOPHER, WILLIAM RUNCEMAN AND THE MERCHANTS' BANK OF CANADA.

*Division Court executions—Interpleader—Insolvency proceedings—Priorities.—Jus Tertii.*

The bank, the three defendants C., and the defendant R., each had executions in the Division Court against one D., in the hands of defendant Cowan, as bailiff, who seized the goods in question in July, 1875, and advertised them for sale. One O'C. gave notice of claim, and there was an interpleader between him and the bank, on which judgment was given on 30th November, 1875, against the claimant.

On 15th November an attachment in insolvency issued against D., the execution debtor, and the official assignee gave notice thereof to the bailiff, defendant Cowan, who on the 4th December, being indemnified, sold the goods. The plaintiff claimed as a purchaser from O'C., who claimed under a chattel mortgage from D., dated 25th January, 1875, and obtained the goods on 27th November, 1875, from the official assignee, who knew nothing of the interpleader, and sold them to the plaintiff, from whom the bailiff took them. The plaintiff having sued in trespass and trover, was nonsuited.

*Held*, that as between the plaintiff and the execution creditors, the plaintiff by the interpleader judgment was postponed to them: that the assignee had priority over the execution creditors, but not necessarily over the plaintiff as mortgagee; and a new trial was granted in order to determine whether the plaintiff could, by setting up the insolvency proceedings and the claim of the assignee, recover against defendants.

On a second trial, the jury having found a general verdict for defendants, *Held*, that the plaintiff, unless suing under and by authority of the assignee, and of which there was no evidence, had no right to avail himself of the assignee's title; and the verdict was affirmed.

*Quære*, if this were otherwise, whether the plaintiff, on the evidence set out below, could have recovered against the defendants as for a joint trespass or conversion.

DECLARATION: First count: trespass on the 2nd December, 1875, to goods. Second count: trover.

Defendant Runceman pleaded: 1. Not guilty. 2. Plaintiff not possessed of the goods.

John Christopher, George Christopher, and Aaron R. Christopher, pleaded together the like pleas of not guilty and not possessed.

Thomas Cowan pleaded: not guilty by Statutes, Consol. Stat. U. C. ch. 19, secs. 115, 152, 153, 155, 175, 176, 177, 193, 195, 197, 198, and ch. 126, secs. 1, 9, 10, 11, 16, 20.

The Merchants Bank of Canada pleaded: 1. Not guilty.



2. Plaintiff not possessed. 3. Plea in estoppel, because on the 2nd of July, 1875, in the Fifth Division Court of the county of Oxford, the said bank, by the judgment and consideration of the Court, recovered a judgment against one William M. Dwyer for the sum of \$62 debt, and \$3.20 costs of suit, which Dwyer was ordered to pay: that the bank, on the 3rd July, 1875, for having satisfaction of the debt and costs, issued execution on the judgment from the said Court, which was directed to the defendant Cowan, as bailiff of the Court, by which the bailiff was commanded to levy of the goods and chattels of the said Dwyer, &c.: that the bailiff, under the writ, duly seized and took in execution the goods and chattels in the declaration mentioned, in the actual possession of Dwyer, as and for the proper goods and 'chattels of Dwyer, liable to be seized and taken as aforesaid, and kept the same until the sale hereafter mentioned, for the purpose of levying thereout the moneys in the said writ mentioned. And thereupon, the plaintiff, professing to have a claim and title to the said goods superior to, and which, if valid, would have defeated the claim and right of the bank to have the said goods seized and sold under the said writ, caused a claim to be made to and in respect of the goods, on the bailiff for the purpose of enforcing his said claim, but caused the same to be so made in the name of one John O'Callaghan, who, in truth, had no legal right, title, or interest in the same; and caused and procured the said John O'Callaghan to give notice to the bailiff that John O'Callaghan claimed the said goods as his own property; and in making the claim, and in the proceedings upon it, and on the hearing of the summons, John O'Callaghan was the agent of and for the plaintiff, for the purpose of enforcing the alleged claim of the plaintiff to the goods, and not otherwise; which facts the plaintiff and John O'Callaghan fraudently withheld and concealed from the defendants, and from the bailiff and Court, during all the proceedings hereafter named. The plea then set out an interpleader summons issued on the 24th of July, 1875,

by the bailiff, calling upon the bank and upon John O'Callaghan, to appear before the Court on the 17th of September, 1875, in respect of the title to the said goods: that the claim, under the said summons, was duly heard before the Judge of the said Court, the bank and the said John O'Callaghan duly appearing thereto; and that the Judge, on the 30th of November, 1875, duly made his order and judgment in the matter of the said claim and summons, and thereby adjudged and determined that the said goods so seized, being the same in the said summons and in this declaration mentioned, were not, nor were any part thereof, the goods and chattels of John O'Callaghan. And that the claim of John O'Callaghan to the said goods, for and on behalf of the plaintiff, so adjudicated upon, is the supposed claim and title to the same set up by the plaintiff in this action, and not another or different title. Whereupon the bank, under the said writ and order, sold the said goods and levied thereout the moneys so required to be levied, which sale, and the taking of the goods in this plea mentioned, are the trespasses and conversion in the declaration mentioned. Wherefore the bank prayed judgment if the plaintiff ought to be admitted to say that the goods in the declaration mentioned were at the said time when, &c., the goods of the plaintiff, as alleged.

Replication 1. Issue upon all the pleas. 2. To the third plea of the bank: that after the execution had been issued against Dwyer, and after John O'Callaghan had made claim to the goods as his property, and before judgment was given upon the said claim, a writ of attachment was issued out of the County Court of Oxford, under the Insolvent Act of 1875, against the goods of the said Dwyer of which the bank had notice. And the said goods were given up and delivered by the said bailiff to James McWhirter, one of the official assignees for the county, who claimed the said goods under the said writ. Whereupon the said John O'Callaghan filed his petition in the County Court of the County of Oxford, under the Insolvent Act of 1875, claiming the said goods as his own property, and such proceedings were had upon the petition that the

said James McWhirter, on the 27th of November, 1875, gave up possession, and delivered the said goods to the said John O'Callaghan, who took possession of the same. And John O'Callaghan afterwards, on the 29th of November, 1875, sold the said goods for good consideration, to wit, \$450 to the plaintiff; and John O'Callaghan delivered the said goods to the plaintiff, who received and took possession of the same, after which the trespasses and the conversion complained of in this action took place.

Rejoinder : 1. Issue. 2. To the second replication : that the writ of attachment in the replication mentioned was issued by one J. Dwyer, professing to be, but who in fact was not, a creditor of the said William M. Dwyer, for a fictitious and fraudulent debt. And the attachment was issued, and the proceedings had thereunder in the replication mentioned were had and taken by the said J. Dwyer, the said William M. Dwyer, the plaintiff, and the said John O'Callaghan, with the intent and design fraudulently and illegally to hinder, defeat, and delay the bank, as such creditors, and with the intent and design to procure the said goods so seized, under the said execution, to be released from the same. And the said proceedings in insolvency were, by reason of the premises, wholly null and void ; nor did the bank take or receive any benefit under the said insolvency proceedings and they always repudiated the same. Issue.

The cause was tried before Gwynne, J., at Woodstock, at the Fall Assizes in 1876.

*Thomas Cowan*, one of the defendants, said : I produce, at the suit of the bank, an execution from the Fifth Division Court, against the goods of William M. Dwyer, to levy \$65, besides costs ; I received it on 3rd July, 1875, and another writ at the suit of the three defendants, Christopher, from the same Court against the same party, to levy \$39.31, besides costs ; received it 1st December, 1875 ; also another at the suit of J. McDermott, from the same Court, against the same party, to levy \$104.36, besides costs ; I received it 18th September, 1875 : I had another at the suit of Runceman, from the same Court against the

same party, to levy about \$25; I received it about the 3rd of July, 1875; I levied on the 3rd of July, 1875, on a quantity of free stone, rough and finished; two free stone monuments, two marble monuments. [It is admitted all the goods in the declaration were seized.] I advertised the sale; John O'Callaghan served a notice of claim; I interpleaded by directions of the bank; I made a fresh seizure on the same goods on receipt of each execution; I did not sell until 4th December, 1875; judgment was given on the interpleader summons on 30th November, 1875. Mr. James McWhirter, who is official assignee of the county, gave me notice in November, 1875, that the judgment debtor Dwyer had been put into insolvency under a writ of attachment; that attachment was issued on the 13th of November, 1875. Upon receiving such notice I did nothing but keep up my postponements of sale, waiting for the decision of the Judge in the interpleader matter. McWhirter, as official assignee, took possession, under the attachment, of the goods which I had seized. Afterwards, on the 4th of December, 1875, I got a bond of indemnity from Runceman and George Christopher to sell. I was authorized by Messrs. Brown & Wells, the solicitors of the Merchants' Bank, to sell the goods; the goods brought \$260, including rent \$100, and taxes \$15; the present plaintiff, who is son of John O'Callaghan, forbade the sale.

*Cross examined* :—The first adjournment under the interpleader summons was at the instance of John O'Callaghan, the claimant; I left the goods in his shop when I seized them, with Dwyer's assent; I had a bond from John O'Callaghan when he claimed, that the goods should be forthcoming, if required by the result of the interpleader. When McWhirter gave me notice of the writ of attachment in insolvency, I did not say or do anything; I did not give him the goods; I sold the goods to a young man named Smith, who had been in Dwyer's employ; the goods were always on Dwyer's premises; I acted in good faith, as a bailiff of the Division Court.

*John O'Callaghan* said :—I am a grocer in Ingersoll, and



knew Wm. M. Dwyer; he was a marble cutter; I remember his getting into difficulties and into insolvency; I endorsed all these notes for him; I got a bill of sale from him dated 25th June, 1875: it covered the goods sued for, and other goods; it was to secure the notes I had endorsed. [The total claim would be \$750 covered by the bill of sale; and other sums amounting to about \$505.] I obtained the goods in question from McWhirter; he had them in insolvency; McWhirter himself gave them up to me; a man named Capron had possession of them; I got them on the 27th of November, 1875; I took possession of them and removed them to an adjoining lot; I sold the goods to plaintiff on the 29th November, 1875, for \$450; \$150 was paid in cash, and two notes given to me for \$150 each, at six and twelve months; plaintiff, my son, took part of the goods away, and was going to take all, when Cowan, the bailiff, came and prevented him; I filed this petition in insolvency on 22nd November, 1875.

*Cross examined*:—I had no title to the goods excepting under the bill of sale produced, and that title I sold to my son.

*James McWhirter* said:—I am official assignee of the county; I got the writ of attachment on 13th November, 1875; I seized the goods in question at Dwyer's shop, and put a man, Capron, in possession; I was served with this appointment of the Judge on 22nd November, appointing the 4th of December to hear the matter of the petition of John O'Callaghan; I referred to the solicitor of the attaching creditor, who gave me instructions, and I relinquished possession of the goods, letting John O'Callaghan take them under his mortgage; no adjudication was made on the petition; O'Callaghan was to pay Capron for the time he had been in possession.

*Cross examined*:—I have since been appointed creditor's assignee; I have got other property of Dwyer's in insolvency to the amount of \$600; I knew nothing of the interpleader proceedings when I relinquished the goods; I heard of them a day or two after; I never sold the goods to O'Callaghan; the creditors are only waiting the result

of these proceedings; they have never given up their claim to the goods; the estate of Dwyer is still in my hands to be administered in insolvency.

*D'Arcy Augustine* merely said he made the valuation produced, and it was a fair one, \$450.

For the defence, evidence was given that the value was from \$250 to \$300. It was agreed between the parties that the value should be stated at \$275.

The learned Judge noted as follows:—"I shall have to non-suit and reserve leave to the plaintiff to move to enter a verdict for him against all or any of the defendants, if, upon the evidence the Court shall be of opinion, acting as a jury, that they or any of them are liable. The damages to be \$275, if the plaintiff shall succeed against all, or any, of the defendants. My opinion is, that, as the first seizure was *primâ facie* good under the writs of execution which were *sub judice* in the Division Court when the attachment in insolvency issued, the right of Dwyer, if he had any, which passed to the assignee, was subject to the adjudication in the interpleader between John O'Callaghan and the bank; and that the subsequent adjudication concluded John O'Callaghan's claim, and as he never had any new title, his bill of sale to him has passed nothing.

But assuming Mr. Norris's contention for the plaintiff to be correct, that the attachment wholly divested the Division Court of jurisdiction to decide on the interpleader, and that the goods passed instantly to the assignee as the goods of Dwyer, then they are still the goods of Dwyer, to be dealt with in insolvency; and as the plaintiff asserts no claim in virtue of the insolvency, or under the assignee, he has no *locus standi* in Court. In this view neither would the defendants have a title as against the creditors in insolvency. My only course, therefore is, it seems to me, to non-suit the plaintiff, leaving the rights of the parties to be adjudicated upon in insolvency, into which Court, according to Mr. Norris's own contention, all title to the goods and adjudication over them are transferred."

The plaintiff, thereupon, was non-suited.

In Michaelmas Term, November 22, 1876, *Ferguson*, Q. C., obtained a rule calling on the defendants to shew cause why the nonsuit should not be set aside, and a verdict entered for the plaintiff for \$275 damages, upon the evidence given at the trial.

During the same time, November 30, 1871, *S. Richards*, Q. C., shewed cause for all the defendants but Runceman, and *Read*, Q. C., for Runceman. John O'Callaghan is estopped by the adjudication in the interpleader suit from disputing the claim of the bank to the goods in question, and the right to seize them under these executions as the goods of William M. Dwyer, the execution debtor. And so also is the plaintiff estopped, who purchased from and claims title only under him. John O'Callaghan has no title from the assignee in insolvency. The assignee abandoned the goods, and John O'Callaghan took possession of them and sold them, but the assignee did not give up his claim to the goods, he is waiting to see what the result of this suit is to enable him to say how he shall act.

*Ferguson*, Q. C., supported the rule. The insolvency got rid of all the executions. The property of the execution debtor passed to the assignee. John O'Callaghan petitioned the Judge to have possession of the goods given up to him; and thereupon he and the assignee agreed that the assignee should abandon the possession, and that the other should take it, which he did; and upon that he sold to the plaintiff, who has thereby acquired a good title. The plaintiff, by that purchase, was in possession of the goods. The defendants, execution creditors, had not, so long as the proceedings in insolvency were pending, any right to take the goods and sell them under these writs. The bailiff may be entitled to a nonsuit for want of proper notice of action.

March 10, 1877. WILSON, J.—It is clear if the attachment in insolvency had not issued that the adjudication upon the claim of John O'Callaghan against the bank, to the goods in question, which was made adversely to the

claimant, would have estopped him, and as a consequence the plaintiff also, who claims as a purchaser under him, from disputing the right and title of the bank to retain and sell the goods under their execution. The same claim which was determined against John O'Callaghan on the bank execution would be evidence for the other execution creditors also, not by way of estoppel, but evidence that, as John O'Callaghan had no right as against the bank, he had none as against the other execution creditors, whose claims were of the same nature as that of the bank, and whose claims he did not dispute. The rights and interests of all the execution creditors may, therefore, be put upon and be considered upon the like footing as those of the bank. What effect, then, had the issuing of the attachment in insolvency, which superseded the operation of the executions, upon the rights of the respective parties?

It is contended, as I understand the plaintiff's argument, that although the executions had acquired precedence over the bill of sale of John O'Callaghan, and would have retained it if the attachment in insolvency had not been issued, yet, as the effect of the attachment was to supersede the executions, it left the claim of John O'Callaghan free from these executions to be urged adversely to the official assignee. And that it did not supersede the claim of John O'Callaghan as mortgagee, because the executions had postponed it to them.

In the *Bank of British North America v. Jarvis*, 1 U. C. R. 182, the facts were: the plaintiff served the absconding debtor personally with process before he left, and recovered judgment against him on the 6th of July, 1843, and gave the sheriff an execution against his goods on the same day. Bernard, another creditor of the same debtor, upon a warrant of attorney, entered judgment on the 15th of June, 1843, and an execution against goods was given to the sheriff on the same day.

Sir John Robinson, C. J., in giving the judgment of the Court, said, p. 183:—"I think it clear on the facts of this case, that the plaintiffs having sued out process and served it on



the debtor before he absconded, are entitled to priority before the attaching creditors. If there were no question but between them and Bernard and Curtis, then, clearly, as the latter obtained judgment first, they would have a claim to be first satisfied, but they cannot be satisfied till all the attaching creditors are paid."

The clause of the Act relied on by the Court on that occasion was probably the 5 Wm. IV. ch. 5, sec. 4. It is of no consequence at present whether that point was quite so clear as it was considered by the Court to be. It is sufficient for the purpose to say that the Court considered that Bernard, by reason of his prior judgment, had a preference over the bank apart from the Absconding Debtors' Act. But that by reason of there being attaching creditors, these creditors having a preference over Bernard, who had recovered a judgment neither by serving process personally on the debtor, before any writ of attachment had been sued out, nor by proceedings under that statute, that necessarily gave the bank a preference over Bernard, because the bank had a preference over the attaching creditors.

In *Sparrow v. Cooper*, 1 Jones Ex. R. (Irish) 72, it was held that if there is a question between a registered and an unregistered title, that priority will, of course, be given to the subsequent title which is registered against the other; and that if there are judgments which have a priority to the registered deed, that deed "carries on the judgments prior to it upon its back," the statute "by moving on the registered deed it carries on with it the prior judgments," so as to give them priority to the unregistered title: *per* Pennefather, B. *Ib.* 75.

But if there is no question in the suit between a registered and an unregistered title, the unregistered earlier title will prevail over the judgments which are subsequent to it.

In *Edwards v. English*, 7 E. & B. 564, a bill of sale of goods was made to Hatton by Hare, the affidavit of which was defective. A subsequent bill of sale of the same

goods, subject to that of Hatton, was made by Hare to Edwards, and was properly filed.

A creditor of Hare sued out execution against Hare's goods, and directed the sheriff to seize the goods so mortgaged, as the goods of Hare.

Two interpleader suits were ordered, in which Hatton and Edwards were respectively plaintiffs, and the creditor defendant, the question in each case whether the goods were the goods of the plaintiff.

In *Hatton's Case* the creditor had a verdict, because Hatton's bill of sale was void as against the creditor, by reason of the defective affidavit.

In *Edwards's Case* it was urged that, though Hatton's bill of sale was void against the creditor, it was valid as against Edwards; and that the goods were not therefore the goods of Edwards, and that the creditor was entitled to the verdict in that case also. It was held that the substance of the issue was whether the goods were seizable as against Edwards: that they were not so seizable, and that, therefore, the plaintiff Edwards was entitled to the verdict.

Erle, J., said, p. 566: "As between Hatton and Edwards there had been a valid bill of sale to Hatton; but it was void as against English" (the execution creditor), "who has availed himself of the statute, and treated it as void, and having done so, he tries to set it up as valid against Edwards.

\* \* Both bills of sale were valid as against Hare; and Edwards's bill of sale as against English, the execution creditor. There may no doubt be a question between Hatton and Edwards as to which is to have those goods. I rather think at present Hatton is not entitled to maintain any claim against Edwards, but, whether he can do so or not, that in no way concerns English."

In *Benham v. Keane*, 7 Jur. N. S. 1096, see also in Appeal 8 Jur. N. S. 604, the facts were:—1. Beavan had a judgment entered on the 29th of December, 1836, and registered on the passing of the 1-2 Vict. ch. 110, in the Common Pleas, and duly re-registered there every five years; and registered in Middlesex, on the 10th of November,

1857. 2. Robins had a judgment entered the 15th of April, 1846, registered in the Common Pleas on the same day, but not re-registered there till March, 1858; registered in Middlesex on the 16th of May, 1846; assigned to plaintiff prior to re-registration. 3. Benham, the plaintiff, had a judgment entered on the 24th of May, 1847, registered in the Common Pleas on the 27th of the same month, and always duly re-registered; registered in Middlesex, on the 4th of January, 1848. 4. Daniel Keane had a mortgage, dated the 29th of August, 1847, for £2500, and interest, registered in Middlesex on the next day, and he mortgaged the premises to Landon and Keane, on the 24th December, 1853, to secure £900 and interest. Held, first, that Robins's judgment had priority over that of Beavan, as to lands in Middlesex, because Robins's judgment was registered in Middlesex before that of Beavan, and that notice by Robins of Beavan's earlier judgment was of no avail; notice between judgment creditors not applying. Second, that Landon and Keane's mortgage had priority over the judgment of Robins, because Robins had not from 1846 re-registered his judgment in the Common Pleas until 1858; and the effect of requiring re-registration there was to save the necessity of a purchaser from searching for a further period back than for five years; and as Landon and Keane had taken their mortgage in 1853, and more than five years after Robins had registered his judgment in 1846, and before he had re-registered it in 1858, they were entitled to prevail over Robins's judgment. Third, that Benham's own judgment stood in due order of date and registry before Landon and Keane's mortgage for £900. Fourth, that although, as between Robins's judgment and Benham's, Robins had priority; yet, as Landon and Keane had priority to Robins, the effect was to advance Benham's judgment along with Landon and Keane's mortgage, so as to give them both a priority over Robins's judgment.

The order was arranged as follows:—No. 1 was postponed to Nos. 2 and 3, because the county registry was first

effected by Nos. 2 and 3. No. 2 was postponed to No. 4, because the judgment was not re-registered in the Common Pleas for more than five years, under the statute, so as to give notice to encumbrancers such as No. 4 was. No. 3 had priority over No. 1, because before it in point of date in the county register; but it would have been after No. 2, if 2 and 3 had stood alone, because No. 2 had the prior county register. No. 4 was postponed to No. 3, because No. 3 was prior to it in date and in due registrations; but No. 4 stood before No. 2, as before mentioned; and it stood also before No. 1.

I refer also to *Thorne v. Torrance*, 16 C. P. 445, 18 C. P. 29.

The effect of these decisions is: If there are three parties, A, B, C, and as between A & B, A has the priority; and as between B and C, B has the priority, but as between A and C, C has the priority—that A does not keep his place, because as between himself and B he has precedence, and B, as between him and C, ranks before C; but C having precedence over A, carries B along with him, and preceding him, so that the order is B, C, A.

Now, in this case, as between the plaintiff and the execution creditors, the plaintiff was, by the interpleader judgment, postponed to them.

As between the execution creditors and the assignee in insolvency, the assignee got priority over them. That did not necessarily give him priority over the plaintiff, as mortgagee.

In my opinion, as such mortgagee, the plaintiff may set up his rights against the assignee in insolvency, and shew that the executions are defeated by the insolvency proceedings. Why, or upon what ground, the plaintiff, as mortgagee, was postponed to the execution creditor in the interpleader suit, does not appear; and there is no evidence in this cause which shews his claim is not perfectly valid. I understand, from the learned Judge who tried the cause, that the mortgage was avoided on the ground of its being contrary to the provisions of the Chattel Mortgage Act,



and that evidence was not received at the trial to prove that fact.

As already said, that evidence would not have been required as between the plaintiff and the defendants, because the interpleader proceedings determined their rights and priorities; but as between the plaintiff and the official assignee, whose claim the plaintiff relies upon for ousting the rights of the execution creditors, and for re-establishing his own, such evidence could have been given for the purpose of shewing the mortgage to be void also as against the official assignee, which would be setting up the *jus tertii* in support of the earlier possession of the execution creditors.

I see very little use of this suit. The execution creditors have no right to the goods as against the official assignee, and the plaintiff will not advance his rights in the least, even if he get a verdict in this cause, because the execution and other creditors of the common debtor can contest the matter over again with him, and as the execution creditors succeeded upon the interpleaders, there is every probability the official assignee will succeed against him too. It seems, then, that the two parties to the cause are litigating about what may be said to concern neither of them. They are trying, at their own risk and expense, whether the official assignee is to have the goods or not. I should think it wiser for the parties to agree to discontinue this unprofitable suit, each party paying his own costs, and remitting the whole subject to the Court of Insolvency, to be dealt with there.

If that cannot be done, I think the case must be sent down to trial again, to determine whether the plaintiff can, by setting up the insolvency proceedings, defeat the right of the defendants to a verdict.

The rule will be absolute for new trial; costs to remain to be dealt with by the Court when the result is known.

*Rule absolute.*

The cause was carried down again to trial, and the second trial took place before Galt, J., and a jury, at the last Assizes for the county of Oxford.

The learned Judge left the whole case to the jury, and asked the jury in any event to assess the damages which the plaintiff, if entitled to sue, was entitled to recover.

The evidence on the second trial did not add to that given on the first—set out 75-78, *ante* p. 277, 280.

There was no evidence that the plaintiff was suing under or by the authority of the assignee; nor did it appear that Cowan had ever abandoned his seizure.

When the evidence was closed the learned Judge suggested that the jury should be discharged, and the Court allowed on the evidence to decide the legal questions. Counsel for the defendants acquiesced, but counsel for the plaintiff objected, so the case went to the jury by desire of counsel for the plaintiff.

The jury rendered a general verdict for the defendants, but under the direction of the learned Judge assessed the damages at \$150, in case the plaintiff was entitled to a verdict, and at the same time found the value of the goods in dispute to be \$300.

During this term, May 23, 1877, *Norris* obtained a rule calling on the defendants to shew cause why the verdict should not be set aside and a verdict entered for the plaintiff for the sum of \$300, or such other sum as the Court from the evidence, and the assessments of the jury, might consider the plaintiff entitled to, on the grounds that the evidence shewed that the goods, the conversion of and trespass to which are the subject of this suit, were the property of the plaintiff, and the acts complained of as such conversion and trespass were all either admitted by or proved against the defendants and each of them; and the defendants did not, nor did any of them, prove or shew any sufficient justification; and that on the law and the evidence the plaintiff was entitled to a verdict for the said sum, being the sum assessed by the jury as the value of the goods; and that

the direction of the learned Judge who tried the cause to enter the said verdict for the defendants was erroneous; or why the said verdict should not be set aside, and a verdict entered for the amount aforesaid against the defendants the Merchants' Bank of Canada, on the grounds aforesaid, and on the ground that according to the evidence the plaintiff in any case had a good title as against the said defendants.

In the same term, May 31, 1877, *S. Richards*, Q. C., *Wells* with him, for defendants other than Cowan, shewed cause. As against the Merchants Bank of Canada, the plaintiff shewed no title, and was not in any position to set up the title of the assignee, if any, for the purpose of defeating the right of the Merchants Bank of Canada under the interpleader decision: *Edwards v. English*, 7 E & B. 564; *Thorne v. Tilbury*, 3 H. & N. 534. There was no evidence whatever of a joint trespass or conversion by all the defendants: *Grant v. Wilson*, 17 U. C. R. 144; *Ovens v. Bull*, 1 App. 62.

*Osler*, for defendant Cowan. The defendant Cowan, although indemnified, was entitled to notice of action: *Lough v. Coleman*, 29 U. C. R. 367; *Waterman* on Trespass, vol. i., p. p. 106, 107, 108.

*Norris*, contra. Cowan abandoned the goods, and before the sale made a second seizure, and at that time the plaintiff was in possession of the goods. This being so, the defendants, as against his possession, must prove title: *Ashmore v. Hardy*, 7 C. & P. 501. The defendants have not proved any title as against the plaintiff's title. On the contrary, it appears that by reason of the insolvency proceedings the title, if any, of the defendants is gone. The verdict for defendants is, therefore, against law and evidence, and should be entered for the plaintiff for \$300, the assessed value of the goods.

June 30, 1877. HARRISON, C. J.—We do not see that we can, on any ground satisfactory to ourselves, interfere with the finding of the jury in favour of the defendants.

The learned Judge before whom the cause was last tried desired to discharge the jury and allow the Court to decide the legal question; but counsel for the plaintiff would not consent, and, apparently having greater confidence in the jury than the Court, insisted that the case should go generally to the jury.

His confidence, it would seem, has been misplaced, and now he appeals to the Court to set aside the adverse general verdict of his chosen tribunal, on the ground that the same is against law and evidence.

We cannot say on what ground the jury found a general verdict for the defendants. If the jury were of opinion that the bill of sale through and under which the plaintiff claims was fraudulent as against creditors, they had a right to render a verdict against it, and no other tribunal in that case could properly find fault with them for so doing.

The rule to set aside the verdict does not complain of any specific misdirection on the part of the learned Judge, and the general ground taken, that he directed a verdict for the defendants, is contrary to the fact.

When the case was last before us we were all of opinion that but for the insolvency proceedings the defendants, under the decision of the interpleader proceedings in favour of the Merchants' Bank of Canada, would be entitled to succeed, but we did not then decide as to the effect, if any, to be given to the insolvency proceedings.

We expressed a hope that there would be a discontinuance of the suit, but failing that ordered a new trial to determine upon the new evidence, after attention had been especially directed to the point whether in effect the plaintiff can, by setting up the insolvency proceedings, defeat the *prima facie* right of the defendants to a verdict under the interpleader proceedings.

Having read the evidence given at the last trial, we may now say that we are satisfied, in the absence of evidence that the plaintiff is suing under and by authority of the assignee, that he has no right to seek to avail himself of the assignee's title in this suit, and we also are satisfied that



there is no evidence that he is now suing in any such character : *Edwards v. English*, 7 E. & B. 564; *Thorne v. Tilbury et al.*, 3 H. & N. 534; *Biddle v. Bond*, 6 B. & S. 225.

The plaintiff between himself and the defendants, must fail in his claim to the goods, because of the interpleader proceedings. But as between the defendants and the assignee in insolvency it might be that the defendants would fail in their claim to the goods. The assignee, however, is no party to this suit. The plaintiff proves no authority from the assignee to bring this suit, and at the last trial utterly failed to shew that he had any pretence of title under the assignee. So far, therefore, as the present suit is concerned, the assignee may be put out of the question, and so may the insolvency proceedings : *Bertram v. Pendry*, 27 C. P. 371; *Mason v. Merchants' Bank*, 27 C. P. 383. The assignee having abandoned the goods, the right to them as between the plaintiff and the defendants must be decided without any reference to the insolvency proceedings.

In this view we are of opinion that the plaintiff must fail in his present suit by reason of the adverse decision in the interpleader proceedings. It does not appear that the bailiff who made the seizure which led to the interpleader proceedings ever abandoned the seizure. The goods, although restored to the claimant on taking his bond that they would be forthcoming when required, were still in the custody of the law. After the interpleader proceedings were terminated in favour of the execution creditors the bailiff had a right, as against the claimant or any one claiming under him, to re-take the goods as of the original seizure. This the bailiff did. In his doing so there could be no trespass as against the plaintiff claiming under the bill of sale, unless, at all events, it were made to appear that the plaintiff had in the meantime acquired some paramount title. This the plaintiff has entirely failed to establish. He is therefore, as regards these defendants, not in any better position than his father, who was the claimant in the inter-

pleader proceedings, and against whose right judgment was given in those proceedings: *Green v. Rogers*, 2 C. & K. 148; *Chase v. Goble*, 2 M. & G. 930; *Carne v. Brice*, 7 M. & W. 183; *Gadsden v. Barrow*, 9 Ex. 514; *Grant v. Wilson et al.*, 17 U. C. R. 144; *Green v. Stevens*, 2 H. & N. 146; *Ovens v. Bull*, 1 App. 62.

But even if this were not so we cannot avoid seeing great difficulty in the way of the plaintiff suing all these defendants as for a joint trespass or a joint conversion. It is apparent that they do not all stand on the same footing. The bailiff, notwithstanding the indemnity which he received, was entitled to notice of action, which was not given to him: *White v. Morris*, 11 C. B. 1015; *Lough v. Coleman*, 29 U. C. R. 367. Two only of the defendants indemnified the bailiff to make the sale. Some of the remaining defendants are not shewn to have done anything beyond placing their writs of execution in the hands of the bailiff to be executed according to law.

While it is clear that if all the execution creditors could on the evidence be said to have been acting together in controlling the officer in the execution of the writs, all might be sued in the one action as trespassers and made to pay the whole amount of damage sustained by the plaintiff because of their joint act—*Lough v. Coleman*, 29 U. C. R. 367; *Macklem v. Durrant*, 32 U. C. R. 98—it is equally clear that an execution creditor who does no more than place his writ in the hands of the sheriff or bailiff to be executed, and who does not assume to control him in the discharge of what the officer conceives to be his duty, is not liable to be sued, either in trespass or trover, with the officer for mistake of law by the officer: *Tilt v. Jarvis*, 5 C. P. 486, 7 C. P. 145; *Jacobs v. Robb*, 10 U. C. R. 276; and this, even if it were shewn that they had received from the officer the proceeds of sale or some portion thereof: *Wheelock v. Archer*, 26 Verm. 380. If there be several execution creditors and some only agree to indemnify the officer, the officer may, at his peril, decline to act for those who refuse indemnity: *Smith v. Osgood*, 46 N.

H. 178; *Davidson v. Dallas*, 8 Cal. 227; *Loring v. Neville*, 36 Cal. 455. The mere giving of an indemnity by a person who is not an execution creditor is not enough to make the person giving it a wrong doer: *McLeod et al. v. Fortune* 19 U. C. R. 98. It is not necessary, however, in the view which we take of the case, to pursue this branch of it any further.

In our opinion the rule *nisi* must be discharged.

MORRISON, J., and WILSON, J., concurred.

*Rule discharged.*

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REGINA V. RODDY.

36 Vic. c. 10, sec. 4, O.—What is “a crime”—Evidence.

An information under 37 V. c. 32, secs. 28 and 34, O., for selling intoxicating liquors on Sunday, was held to be so far a charge of a criminal character that the defendant could not be compelled to give evidence against himself, under the 36 V. c. 10, sec. 4, O., which authorizes such evidence in any matter “not being a crime.” A conviction for such offence obtained on defendant’s evidence was therefore quashed.

The 36 Vic. ch. 10, sec. 4, is not repealed or affected, as regards proceedings under the Tavern and Shop Licenses Act, by 37 V. c. 32, O.

G. H. Watson, on February 6, 1877, obtained from Gwynne, J., a rule returnable before the full Court calling on John Ritchie, license inspector for the west riding of the county of Peterborough, and David George Hatton, Esq., Police Magistrate in and for the town of Peterborough, to shew cause why a certain conviction made by the said David George Hatton, dated 4th December, 1876, whereby the defendant Robert Roddy was convicted of selling intoxicating liquors on Sunday, 5th of November, 1876, contrary to the statute in that behalf,

should not be quashed, upon the ground that the said conviction was illegally obtained, in this, that the said Robert Roddy was called upon and compelled to give evidence against himself, notwithstanding his own objection and that of his counsel to be sworn or to give such evidence; and on the ground that section 4 of 36 Vic., ch. 10, O., under which the Police Magistrate compelled the defendant to give evidence, is beyond the jurisdiction of the Legislature of Ontario to pass, and is unconstitutional.

The rule was obtained on reading a writ of *certiorari* and the return thereto, including the information, depositions, and conviction had and taken by and before the Police Magistrate of the town of Peterborough.

The information, which was that of John Ritchie, license inspector, and dated 14th November, 1876, stated that he had good reason to believe and did verily believe that the defendant Roddy did, at his place of business in the town of Peterborough, on Sunday the fifth day of November, 1876, dispose of intoxicating liquor contrary to the statute in that behalf.

There was no evidence against the defendant to sustain the charge except his own testimony. He objected to be sworn or to give evidence, but was compelled to do so, and under compulsion gave evidence which established the charge.

He was thereupon on 4th December, 1876, convicted of the offence charged in the information, and adjudged as follows: "For his said offence to forfeit and pay the sum of twenty dollars, to be paid and applied according to law," and also "to pay to the said John Ritchie, the complainant, the sum of four dollars and fifty-five cents for his costs in this behalf; and if the said several sums be not paid forthwith, on or before the seventh day of December instant, I order that the same be levied by distress and sale of the goods and chattels of the said Robert Roddy; and in default of sufficient distress I adjudge the said Robert Roddy to be imprisoned in the common gaol of the said county of Peterborough for the space of fourteen days at hard labour,



unless the said several sums and all costs and charges of conveying the said Robert Roddy to such gaol, shall be sooner paid."

During this term, May 29, 1877, *Grover* shewed cause. The conviction was had under 37 Vic., ch. 32, sec. 34, O. If it does not disclose a crime the evidence was properly received under 36 Vic. ch. 10, sec. 4, O. The cases shew that it does not disclose a crime: *Russell* on Crimes, 9th ed., 88.

*Bethune*, Q. C., contra, *Watson* with him. The 36 Vic. ch. 10, sec. 4, is impliedly repealed by 37 Vic. ch. 32, O. Section 44 of the latter Act provides for a new procedure. It declares that the magistrate shall hear and determine in a summary manner according to the practice and procedure contained in Consol. Stat. C. ch. 103. And the latter Act contains no such provision as 36 Vic. ch. 10, sec. 4. If this be not so it must be held that 36 Vic. ch. 10, sec. 4, is unconstitutional: *Regina v. Ratcliff*, 10 Ex. 84; *Cattle v. Ireson*, E. B. & E. 91; *Re Lucas and McGlashan*, 29 U. C. R. 81.

June 30, 1877. HARRISON, C. J.—The conviction was made under 37 Vic. ch. 32, secs. 28 & 34, O.

Section 28 provides that "In all places where intoxicating liquors are, or may be, sold by wholesale or retail, no sale or other disposal of the said liquors shall take place therein, or on the premises thereof, or out of or from the same to any person or persons whomsoever from or after the hour of seven of the clock on Saturday night till six of the clock on Monday morning thereafter \* \* \* nor shall any such liquor be permitted or allowed to be drunk in any such places during the time prohibited by this Act for the sale of the same."

Section 34 provides, "For punishment of offences against section 28 of this Act, a penalty for the first offence against the provisions thereof, of not less than 20 dollars with costs, or 15 days imprisonment with *hard* labour, in case of conviction, shall be recoverable from, and leviable against,

the goods and chattels of the person or persons who are the proprietors in occupancy, or tenants or agents in occupancy, of the said place or places, who shall be found by himself, herself, or themselves, or his, her, or their servants, or agents, to have contravened the enactment in the said twenty eighth section or any part thereof; for the second offence a penalty, \* \* of not less than \$40 with costs, or 20 days' imprisonment with *hard labour*; \* \* for a third offence, a penalty of not less than \$100 with costs, or 50 days' imprisonment."

So far there is nothing expressed in this Act as to procedure or evidence, but reading further we find sections from 44 to 53 both inclusive, under the heading "Proceedings and Evidence."

Section 44 declares that "All prosecutions for the punishment of the several offences against the provisions of this Act, contained in sections numbered respectively 28, 29, 30, 35, and 36, whether the prosecution be for the recovery of a penalty or for punishment by imprisonment, shall take place \* \* \* in cities and towns where there is a police magistrate, before the police magistrate," and he "shall have authority to hear and determine the same in a summary manner according to the practice and procedure, and after forms contained in and appended to the Act, ch. 103 of Consol. Stat. C."

Section 44 provides that "on such trials and proceedings the prosecutor or complainant shall be a competent witness."

Section 47 provides that "no person shall be rendered incompetent as a witness by reason of his being interested in any portion of the penalty sought to be recovered."

The Act, it will be observed, does not contain any provision that the accused shall be competent or compellable to give evidence against himself, nor does the Consol. Stat. C. ch. 103, contain any such provision.

Such a provision for the first time appears, and only appears, in 36 Vic. ch. 10 sec. 4, O., which declares that "On the trial of any proceeding, matter, or question, under any

of the Acts of the Province of Ontario, relating to tavern or shop licenses, or under the Municipal Institutions Act of Ontario, or under the Assessment Act of Ontario, or under any other Act of the Legislative Assembly of the Province of Ontario, or on the trial of any proceeding, matter, or question, before any justice or justices of the peace, mayor, or police magistrate, in any matter cognizable by such justice \* \* \* *not being a crime*, the party opposing or defending, or the wife or husband of such person opposing or defending, shall be competent and compellable to give evidence in such proceeding, matter, or question."

The first question is, whether 36 Vic. ch. 10 sec. 4, O., is, as regards proceedings under the Tavern and Shop Licenses Act, repealed by 37 Vic. ch. 32, O.

The latter Act recites that it is expedient to amend and consolidate the Acts 32 Vic. ch. 32, O., 33 Vic. ch. 33, O., and 36 Vic. ch. 34, O., and repeals "the several Acts in the recital thereof" mentioned. It does not in any manner refer to or mention 36 Vic. ch. 10, O. It repeals only the Acts mentioned in the recital. 36 Vic. ch. 10 sec. 4, O., is not one of them. There is no provision therein contained actually repugnant to 36 Vic. ch. 10 sec. 4, O. We are unable to decide that 36 Vic. ch. 10 sec. 4, O., is in any manner repealed or affected by 37 Vic. ch. 32, O.

We are therefore forced to put a construction on sec. 4 of 36 Vic. ch. 10, O.

The general policy of the law is, that no man can be compelled to criminate himself, *nemo tenetur se-ipsam accusare*; Consol. Stat. U. C. ch. 32, sec. 18; 33 Vic. ch. 13, sec. 5 sub-sec. 4, O.; *Taylor* on Evidence, sec. 1223; *Powell's* Principles of Evidence, 4th ed., 40; *Paley* on Summary Convictions, 5th ed., 109.

An individual charged with the commission of a criminal act cannot conformably to the course of justice in our tribunals be interrogated by the Court with a view to eliciting the truth, nor is he a competent witness in the case: *Broom's* Legal Maxims, 4th ed., 931.

We have no doubt that the words "not being a crime," as

used in 36 Vic. ch. 10, sec. 4, O., apply to the whole section, for at least two reasons.

1. Because the Provincial Legislature have no direct power to legislate either as to crime or criminal procedure—British North America Act, 1867, sec. 91, sub-sec. 27—and it cannot be intended that the Provincial Legislature assumed to do that which it had no power to do: See *Wilde v. Bowen*, 37 U. C. R. 504.

2. Because even if it had for any purpose the power, we cannot suppose that it was the intention of the Legislature by the language used to reverse a maxim of our law as settled, as important, and as wise as almost any other in it: See per Coleridge, J., in *Scott's Case*, Dears. & B. 47, 61.

While it may be held that the British North America Act has conceded to the Provincial Legislatures the incidental power of enacting certain laws of a criminal character when necessary for the enforcement of laws properly passed by them on matters under their exclusive jurisdiction—See *Regina v. Boardman*, 30 U. C. R. 553—it cannot be held that they have the power, directly or indirectly, of destroying the general rules of evidence appertaining to criminal procedure, or *quasi* criminal procedure throughout the Dominion.

What we mean is this—that while the Provincial Legislature has, under sub-sec. 15 of sec. 92 of the British North America Act, the power to enact “The imposition of punishment by fine, penalty, or imprisonment for enforcing any law of the Province made in relation to any matter coming within any of the classes of subjects enumerated in that section,” the Provincial Legislature has no power in doing so to alter well understood rules of evidence made for the protection of persons substantially accused of crime.

It follows that in every case coming under sec. 4 of 36 Vic. ch. 10, where it is attempted to compel a man to testify against himself, the enquiry must arise whether the charge against him is in substance a charge of crime.

This is the enquiry now raised before us, and from the decision of which we have no escape.



Whether a particular act is a crime or not must depend upon the nature and character of the act.

It is not in the power of the Provincial Legislature to declare an act which by the laws of the Dominion is a crime not to be a crime, so as to make persons substantially accused of crime compellable to give evidence against themselves.

This it appears to us the Provincial Legislature, in the Act before us, has not attempted to do, but it may be said that short of such an attempt, such a provision as sec. 4 of 36 Vic. ch. 10, will be practically worthless, but the answer is, that if the attempt were made the provision would be of no greater value.

It will be well for the Provincial Legislature to consider whether, under the circumstances, the further retention in the statute book of such an embarrassing provision as 36 Vic. ch. 10, sec. 4, is expedient, but while we find it in the statute book we must expound it.

If the act with which defendant is charged under sec. 28 of 37 Vic. ch. 32 is according to the well understood principles of the laws of England a crime, section 4 of 36 Vic. ch. 10, whatever it may mean, or whatever its operation, is inapplicable to this case, and as under colour of it the defendant was wrongfully compelled to testify against himself, the conviction obtained by such illegal means must be quashed.

The question what is a criminal proceeding, as the subject of summary conviction, in England, according to *Paley* on Summary Convictions, 5th ed., 112, 113, "depends on the manner in which the Legislature have treated the cause of complaint, and for this purpose the scope and object of the statute, as well as the language of its particular enactments, should be considered. It may be, as a general rule, that every proceeding before a magistrate where he has power to *convict*, in contradistinction to the power of making an order, is a criminal proceeding, whether the magistrate be authorized, in the first instance, to direct payment of a sum of money as a penalty, or at once to

adjudge the defendant to be imprisoned; and it must be borne in mind, that where a statute orders, enjoins, or prohibits an act, every disobedience is punishable at common law by indictment; in such cases the addition of a penalty, to be recovered by summary conviction, can hardly prevent the proceeding, in respect of the offence from being a criminal one."

Any wilful contravention of any Act of the Dominion Parliament, which is not made an offence of some other kind, is a misdemeanour and punishable accordingly: 31 Vic. ch. 1 sec. 6 sub-sec. 20, D.

So any wilful contravention of any Act of the Legislature of any of the Provinces within Canada, which is not made an offence of some other kind, is also a misdemeanour and punishable accordingly: 31 Vic. ch. 71 sec. 3.

Now, assuming the constitutionality of secs. 28 and 32, of 37 Vic. ch. 32, the question is, whether it is not a crime, in the broad sense of that word, for a person authorized to sell spirituous liquor to make a sale thereof on Sunday, contrary to the provisions of that Act.

It is difficult to imagine a sale on Sunday which would not be a wilful one, but apart from this it is obvious, from a reading of the Act, that the offence is one against the public interest, and may be punished either by fine or imprisonment at *hard* labour.

The proper definition of the word crime is an offence for which the law awards punishment: Per Bayley, J., in *Mann v. Owen*, 9 B. & C. 595, 599.

A crime or misdemeanour is an act omitted or committed in violation of a public law either forbidding or commanding it. This general definition comprehends both crimes and misdemeanours, which, properly speaking, are mere synonymous terms, though in common usage the word crime is made to denote such offences as are of a deeper and more atrocious dye, while smaller faults and omissions of less consequence are comprised under the general names of misdemeanours only: *Butt v. Conant*, 1 B. & B. 548, 575.

The difficulty is not so much to find definitions as to apply them. This difficulty has ever been felt both in England and in this country, as an examination of the cases will shew, whenever an effort has been made by the Courts to draw the line between civil and criminal procedure—between acts illegal which are not crimes, and illegal acts which are crimes.

In *Attorney-General v. Bowman*, 2 B. & P. 532, note, an information against the defendant for keeping false weights was held by Eyre, C. B., not to disclose a crime, and the learned Judge, being of that opinion, rejected general evidence as to character tendered on behalf of the defendant.

In *Huntley v. Luscombe*, 2 B. & P. 530, it was made a question whether a commitment in execution for a penalty before a magistrate for an offence against the excise laws is a commitment for "criminal matter" within the provisions of the *Habeas Corpus* Act.

In *Rex v. Myers*, 1 T. R. 265, it was held that a person who had been convicted in a penalty under the Lottery Act, 22 Geo. II. ch. 47, and arrested on a Sunday, and sent to the house of correction for want of a sufficient distress, was not a criminal, so that his arrest on Sunday was unlawful.

In *Re Eggington*, 2 E. & B. 717, it was held that a town clerk dismissed from office, and convicted before two justices of the peace, under statute 5 & 6 Wm. IV. ch. 76, sec. 60, for wilfully refusing to deliver account books up after notice, was not a criminal, so that his arrest on Sunday was illegal.

In *Attorney-General v. Siddon*, 1 Cr. & J. 220, it was made a question whether a trader concealing smuggled goods and subject to penalties under the Customs Acts, is to be held accused of crime, so as to be free of the misconduct of his servant, and liable only for personal guilt.

In *Easton's Case*, 12 A. & E. 645, it was held that a person sentenced by two justices to imprisonment with hard labour, under the Smuggling Act, 4 & 5 Wm. IV., ch. 13 sec. 2, was in execution for criminal matter under the

*Habeas Corpus* Act, Lord Denman saying "the party is sentenced to imprisonment at *hard labour*, which puts the point beyond doubt."

In *Attorney-General v. Radloff*, 10 Ex. 84, the Court, consisting of four Judges, was equally divided on the question whether the trial of an information filed by the Attorney-General for the recovery of penalties for smuggling under sections 46 and 82 of 8 & 9 Vic. ch. 87, was a civil or criminal proceeding. Contradictory opinions as to what acts are or are not crimes were given by the learned Judges, but as the case decides nothing we forbear to quote them.

In *Re Lucas and McGlashan*, 29 U. C. R. 81, this Court held that a conviction under the Inland Revenue Act, 31 Vic. ch. 8, sec. 130, for possessing a distilling apparatus without having made a return thereof, was a conviction for a crime.

In *Taylor's Case*, 3 East 232, it was held under the *Habeas Corpus* Act that a person committed for contempt of Court was committed for "criminal or supposed criminal matter."

In *Cobbett v. Slowman*, 9 Ex. 633, it was held that a person in custody under a commission of rebellion issued out of equity is not in custody for any criminal or supposed criminal matter within the meaning of the *Habeas Corpus* Act.

In *Cattell v. Ireson*, E. B. & E. 91, it was held that a person convicted by justices under 1 & 2 Wm. IV., ch. 32, sec. 23, for using an engine for the purpose of taking game without the authority of a certificate was a criminal proceeding within the meaning of sec. 3 of Lord Denman's Act, 14 & 15 Vic. ch. 99, so that the party charged was neither competent nor compellable to give evidence against himself.

In *Parker v. Green*, 2 B. & S. 299, a proceeding before justices preferred under 9 Geo. IV., ch. 61, against a person licensed to sell exciseable liquors by retail for "that he did unlawfully and knowingly permit and suffer persons of notoriously bad character to assemble and meet together in



his house and premises," was held to disclose a charge of crime and that the defendant was not a competent witness.

Crompton, J., in delivering judgment said, p. 311, "When a proceeding is treated by a statute as imposing a penalty for an offence against the public, the amount of which penalty is to be meted by the justices according to the magnitude of the offence, there can be no doubt that the proceeding is a criminal one." And Wightman, J., said, p. 309, "the justices may punish such offender by fine, thus treating fine as a punishment for offence against good order and rule."

The latter decision was followed in *Regina v. Sullivan*, L. R. 8 Ir. C. L. 404, where the charge was "for keeping a dog without a license, contrary to the Dog's Regulation (Ireland) Act, 1865. Palles, C. B., said, p. 407, "the penalty is imposed by way of punishment and not as compensation to any particular individual."

In *Sweeny v. Spooner*, 3 B. & S. 329, where the information was under 5 Geo. IV., ch. 83, sec. 4, charging the defendant with running away from the parish of B., whereby his wife became chargeable to the parish it was made a question whether the charge was not so far of a criminal nature as to render the wife's evidence inadmissible against him. And in *Reeve v. Mood*, 4 B. & S. 364, where under sec. 3 of the same statute the charge was against a person for neglect to maintain his wife and children, the wife of the accused was excluded as a witness.

In *Bluck v. Rackham*, 5 Moore P. C. 305, it was held that a proceeding under 1 & 2 Vic. ch. 106, sec. 32, against a beneficed clergyman for penalties for non-residence on his benefice, was a civil and not a criminal proceeding. Such was also the decision in *Rackham v. Bluck*, 9 Q. B. 691.

In *Burder v. O'Neill*, 9 Jur. N. S. 1109, where the suit was against a clergyman under the Church Discipline Act for immorality, it was held that the clergyman was not either a competent or compellable witness, but in the *Bishop*

of *Norwich v. Pearse*, L. R. 2 Adm. & Ecc. 281, the contrary was held.

In *Regina v. Steel et al.*, L. R. 2 Q. B. D. 37., 13 Cox 354, it was held that an order for costs made on the trial of a criminal information is criminal procedure, so that under the Judicature Acts of 1873 and 1875 there could be no appeal from it.

In *Regina v. Fletcher*, L. R. 2 Q. B. D. 43, 13 Cox 358, it was held that a rule for a *certiorari* to bring up a summary conviction by justices, for the purpose of quashing it on the ground of want of jurisdiction, was in substance as well as in form criminal procedure, so that there could be no appeal under the Judicature Acts.

The conclusion which we draw from these decisions is, that the accusation against the defendant here was so far of a criminal nature that he ought not to have been compelled to give evidence against himself, and therefore that the conviction must be quashed.

Although it is not possible to reconcile the decisions, it would seem that where the proceeding, although before justices of the peace, is not simply for the recovery of money payable to some individual informant, but for the punishment of an offence against social order, and where the punishment may be not only the imposition of a fine but imprisonment, and that at hard labour, the offence by whichever Legislature created or assumed to be created is to be looked upon as a crime, and the prosecution a criminal prosecution, so as to exclude the testimony of the accused, either for or against himself.

MORRISON, J., and WILSON, J., concurred.

*Rule absolute.*

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## HICKEY V. FITZGERALD.

*Action for a ssault—Evidence—New trial.*

A number of people, including the plaintiff and defendant, had formed a ring for the purpose of witnessing an expected fight between two persons, one of whom was plaintiff's nephew. The plaintiff, when going forward towards the combatants, was assaulted by defendant, who got into a fight with him and bit his hand severely. Defendant's counsel proposed to ask the plaintiff, on cross-examination, as to a number of fights in which he was said to have been concerned, but the learned Judge refused to allow this; the counsel being unable to state that it was intended for the purpose of testing the plaintiff's credibility. The evidence as to the defendant's purpose in interfering with the plaintiff was contradictory, and the jury were told that if defendant's object was only to prevent the plaintiff from interfering with the fight, and not to prevent a breach of the peace, he was a wrong doer.

*Held*, that the evidence was rightly rejected, and the direction right; and a verdict for the plaintiff was upheld.

The erroneous exercise of discretion in refusing to allow questions on cross-examination, which are irrelevant to the issue, would be no ground for a new trial.

DECLARATION: assault and battery.

Pleas, not guilty and *son assault demesne*. Issue.

The cause was tried at the last Assizes for the county of Simcoe, before Wilson, J., and a jury.

It appeared that on the 8th January last, in the afternoon, there was an affray between two men called McCarroll and Nagle. Nagle was a nephew of the plaintiff. He did not want to fight. McCarroll struck him. Nagle did not strike back. There were thirty or forty persons present, including the plaintiff and defendant. These persons were formed in "a ring," for the purpose of witnessing the expected fight. The plaintiff represented that, when going forward towards the combatants for some purpose not clearly explained, he was first struck by the defendant. This was denied, and the evidence as to which of the two struck first was very contradictory. But whichever struck first it was clear that the plaintiff did assault the defendant, and thereupon there was a fight between the two, in the course of which the plaintiff's hand was severely bitten by the defendant. It was said the plaintiff had in the course of the fight

attempted to gouge the defendant's eyes. The principal question at the trial was, whether the plea of *son assault demesne* was proved. There was no replication of excess.

The plaintiff was cross-examined at great length. When defendant's counsel was proceeding to cross-examine him as to a number of former fights in which it was said he has been concerned, the learned Judge refused to allow it, unless the defendant's counsel intended thereby to test the credibility of the witness thereby. The counsel claimed the right to cross-examine without stating the purpose, and said he could not state it was for the purpose suggested by the learned Judge. Thereupon the learned Judge refused to allow it.

There were seven witnesses called for the plaintiff, and fourteen for the defendant.

The account of the origin of the fight was contradictory. It did not appear that the interference of the defendant was for the purpose of saving Nagle, but rather that Nagle and McCarroll should be allowed to fight without interference. The evidence shewed that defendant wanted to prevent the plaintiff from getting into the ring for the purpose, as he supposed, of helping Nagle who was unwilling to fight; but it was not clear that the plaintiff had any such purpose.

There was evidence that defendant when he interfered with the plaintiff raised his hands, but it was contradictory as to whether defendant pushed or struck the plaintiff.

The learned Judge thought that, according to the weight of evidence, the defendant first struck the plaintiff, but left that and other questions, hereafter mentioned, to the jury for their decision.

The learned Judge told the jury that, if the plaintiff began the fight, and the defendant acted only in self-defence, they should find a verdict for the defendant, but if not, to find for the plaintiff.

The learned Judge also told the jury that if defendant interfered with the plaintiff only to prevent him from interfering with the fight between McCarroll and Nagle, and



not to prevent a breach of the peace, the defendant was a wrong-doer.

Counsel for the defendant objected to this portion of the charge.

Leave was given to defendant to add a plea of justification to prevent a breach of the peace.

The jury substantially found, in answer to questions submitted to them by the learned Judge, that the defendant first assaulted the plaintiff: that he pushed the plaintiff at the time he raised his hands: that his object in doing so was to prevent the plaintiff from interfering with either Nagle or McCarroll: that the defendant in doing what he did, did not act either for the purpose of keeping the peace or for self-defence. The jury were unable to say whether or not the plaintiff tried "to gouge" the eyes of the defendant. They found a verdict for the plaintiff and \$400 damages.

During this term, May 22, 1877, *McCarthy*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict rendered for the plaintiff should not be set aside, and a verdict entered for the defendant, pursuant to the finding of the jury, under the Administration of Justice Act, 1873, on the ground that the jury having found the defendant pushed the plaintiff for the purpose of preventing the plaintiff from taking part in or interfering with the fight which was taking place between McCarroll and Nagle, and that in so doing the defendant was justified,—that the plaintiff consequently assaulted the defendant; or why there should not be a new trial on the ground that the verdict was contrary to law and evidence, in this, that the evidence shews the defendant interfered with the plaintiff for the purpose of preventing a breach of the peace; and for the improper refusal to admit evidence in cross-examination of the plaintiff, who was a witness on his own behalf, tending to show that the plaintiff was a quarrelsome person and had been engaged in many fights with different persons.

During the same term, June 4, 1877, *Lount*, Q. C., shewed

cause. While the evidence was consistent with the purpose of the plaintiff being to prevent a breach of the peace, it was not so as regards the defendant. The defendant had no such purpose, and the jury properly found against it: *Grant v. Moser*, 5 M. & G. 123; *Baynes v. Brewster*, 2 Q. B. 375; *Moriarty v. Brooks*, 6 C. & P. 684. The learned Judge was right in refusing to permit the cross-examination attempted by defendant, and whether or not there is no ground for a new trial on the ground of rejection of evidence: *Downing v. Butcher*, 2 Moo. & R. 374; *Taylor on Evidence*, 6th ed., sec. 1314; *Thomas v. Russell*, 9 Ex. 764.

*McCarthy*, Q. C., contra. Fitzgerald was justified in endeavouring to prevent the plaintiff from taking part in the affray, whether he was willing or not that the affray between McCarroll and Nagle should be continued, and the learned Judge should have so told the jury: *Russell on Crimes*, 5th ed., 892 *et seq.*; 1 *Hawk. P. C.* ch. 28 sec. 11; *Timothy v. Simpson*, 1 C. M. & R. 757, 762; *Price v. Seeley*, 10 C. & P. 28; *Howell v. Jackson*, 6 C. & P. 723. What he did say was misdirection on the point. Besides there was improper rejection of evidence: *Russell on Crimes*, 613; *Taylor on Evidence*, 6th ed., sec. 1293. And the verdict was contrary to law and evidence, and the weight of evidence.

June 30, 1877. HARRISON, C. J.—In the absence of rejection of evidence or misdirection of some kind, we do not feel disposed to interfere with the verdict of the jury.

The first question is, whether there was rejection of evidence. Much latitude is usually permitted in cross-examination of witnesses. This is more particularly the case where, since the change of the law, permitting parties to a suit to be witnesses on their own behalf, the witness cross-examined is one of the parties. It is allowed whether the questions are or not material to the issue. But there must be some limit to it where the questions put are wholly irrelevant to the issue. It has been decided in several cases that with a view to impeaching the *character* or *credit* of

a witness he may be asked on cross-examination questions with regard to crime or other improper conduct on his part : *Harris v. Tippet*, 2 Camp. 638 ; *Rex v. Edwards*, 4 T. R. 440 ; *Rex v. Pitcher*, 1 C. & P. 85, 86, note ; *McCreary v. Grundy*, 39 U. C. R. 316 ; *Starkie* on Evidence, 4th ed., 201 ; *Taylor* on Evidence, 6th ed., sec. 1293. But where the question is irrelevant to the issue the answer of the witness is conclusive : *McCulloch v. The Gore District Mutual Fire Ins. Co.*, 32 U. C. R. 610, 34 U. C. R. 384. It must to a great extent be in the discretion of the presiding Judge to determine how far irrelevant questions may be put to a witness in cross-examination : *Cundell v. Pratt et al.*, M. & M. 108 ; *Clark v. Trinity Church*, 5 Watts & S. 266 ; *Inhabitants of New Gloucester v. Bridgham*, 28 Maine 60 ; *Powers v. Leach*, 26 Verm. 270. And the erroneous exercise of such a discretion, where the question put is irrelevant to the issue, is certainly no ground for a new trial : 37 Vic. ch. 7, sec. 34, O.

We are of opinion, however, that in this case there was a right exercise of discretion. The learned Judge was willing to allow the questions to be put if put for the purpose of testing the *character* or *credit* of the witness, but was not willing to allow them to be put for an improper purpose. If put for the purpose of giving the plaintiff a bad name—of shewing that on other occasions he was of a quarrelsome disposition, and so of leading the jury to infer that because he had been engaged in several previous fights he on this occasion commenced the fight, the purpose was an improper one. See *Edwards v. Ottawa River Navigation Co.*, 39 U. C. R. 264.

No other purpose than the foregoing was suggested, either at the trial or the argument, for the putting of the question, and none other occurs to us.

The next enquiry is, whether there was any misdirection on the part of the learned Judge who tried the cause. He told the jury that if defendant interfered with the plaintiff *only* to prevent him from interfering with the fight between the other two, and *not* to prevent a breach of the

peace he would be a wrong doer. That is the misdirection of which complaint is made.

The preservation of the public peace is the great thing to be attained. Every affray is against the public peace. It is therefore lawful for a private person to interfere for the purpose of preventing the continuance of an affray.

An affray (from *effrayer* to fight) is described as "a publique offense to the terror of the King's subjects," so called, according to Lord Coke, "because it affrighteth and maketh men afraid": 3 Inst. 158. See further, *Chitty's Criminal Law*, vol. iii., 821, note *b.*; *Brown's Dictionary*, "Affray."

There may be an assault which will not amount to an affray, as when it happens in a private place out of the hearing or seeing of any except the parties immediately concerned, in which case it cannot be said to be to the terror of the people: 1 *Hawk. P. C.* 487, sec. 1.

No one can justify laying his hands on those who shall barely quarrel with angry words without coming to blows: *Ib.* sec. 2; but although no bare words, in the judgment of law, carry in them so much terror as to amount to an affray, yet it seems certain that in some cases there may be an affray where there is no actual violence: *Ib.* sec. 4.

It seems agreed that any one who sees others *fighting* may lawfully part them, and also lawfully stay them till the heat be over, and then deliver them to the constable, who may carry them before a justice of the peace, in order to their finding sureties for the peace: *Ib.* sec. 11.

Also it is said that any private person may come and stop those whom he shall see coming to join either party, and from it seems clearly to follow that if a man receives a hurt from either party *in thus endeavouring to preserve the peace* he shall have his remedy by an action against him: *Ib.*

It is not, it is to be observed, said that where the object is *not* to preserve the peace, but *to continue* without interference the breach of the peace already begun for the brutal amusement of those who are looking on, the act is lawful.



If such an act could be held lawful it would be lawful for the lovers of the so-called prize fight in any part of our country to form rings, and preserve the rings thus formed from outside interference, for the sole purpose of enjoying most brutal and brutalizing exhibitions of human degradation.

In every case, therefore, of interference, the question must be whether the interference was for the purpose of preventing a breach of the peace, or whether it was for a sinister purpose.

The learned Judge here refused, and we think properly refused, to exclude from the deliberations of the jury the consideration whether the purpose of the defendant's interference was to prevent a breach of the peace, and the jury found, and we think properly found, that the defendant had no such purpose.

It is impossible to separate the purpose of the act from the act itself when considering its lawfulness.

In *Timothy v. Simpson*, 1 C. M. & R. 757, 762, Parke, B., said: "It is unquestionable that any by-stander may and ought to interfere to part those who make an affray, and to stay those who are going to join in it till the affray be ended."

The judgment of Parke, B., in this case was approved by the House of Lords in *Price v. Seeley*, 10 Cl. & Fin. 28.

Reference may also be made to the following authorities: *Regina v. Tomson*, Kel. Rep. 66; *Moriarty v. Brooks*, 6 C. & P. 684; *Regina v. Hagan*, 8 C. & P. 167; *Regina v. Mabel*, 9 C. & P. 474; *Grant v. Moser*, 5 M. & G. 123; *Ingle v. Bell*, 1 M. & W. 516; *Cohen v. Huskisson*, 2 M. & W. 477; *Baynes v. Brewster*, 2 Q. B. 375; *Summers v. Millington*, 2 Q. B. 524; *Russell on Crimes*, vol. i., 5th ed., 402, 408; *Bishop's Criminal Law*, vol. ii., 5th ed., secs. 3, 4, 5, 6.

For all that appears the purpose of the plaintiff was to prevent the breach of the peace between McCarroll and Nagle. That purpose, if the real purpose of the plaintiff, was apparently opposed to the desire of the defendant and

others, whose purpose it was to see what is sometimes grimly called "sport." If the motive of defendant when interfering with the plaintiff was *not* to prevent a breach of the peace but to ensure a continuance of the breach, his act was as unlawful as his motive was inhuman.

The jury having found that the motive of the defendant was *not* to prevent a breach of the peace, under a charge which in our opinion is sustainable both on principle and authority, the verdict must stand.

No complaint is made as to the amount of damages.

MORRISON, J., and WILSON, J., concurred.

*Rule discharged.*

# IN RE KINGSTON ELECTION—STEWART V. MACDONALD.

*Election petition—Order to pay out deposit money.*

A petition filed on the 6th of February, 1875, against an election, held in December, 1874, was intituled in the Election Court, which Court had been abolished by the 37 Vic. c. 10, D., passed on the 26th of May, 1874, except as regarded elections held before that Act. The deposit of \$1000 was made on the same day with D., who was clerk of the Election Court as well as of this Court, and who signed a receipt for it as clerk of the Election Court, headed in that Court.

*Held*, that this Court had no power to make an order on D. to pay out the money, he having received it as clerk of another Court.

DR. STEWART, the petitioner in person, during this term, May 21, 1877, obtained a rule calling on Byron Moffatt Britton, of the city of Kingston, attorney-at-law, to shew cause why the sum of one thousand dollars, deposited with the petition herein, should not be paid out to the petitioner or to his solicitors, Messrs. Crooks, Kingsmill & Cattanach, upon grounds disclosed in affidavits and papers filed.

The petitioner swore that he instructed Mr. Britton, an attorney, to file the election petition, and to deposit therewith the sum of \$1,000, and that the petition, instead of being intituled by the said attorney "In the Queen's

Bench," as it ought to have been, was intituled "In the Election Court."

The election petitioned against was held in December, 1874.

The petition was filed on 6th February, 1875. It was intituled "In the Election Court," and was delivered to R. G. Dalton, Esq., Q. C., who was clerk of the Election Court as well as clerk of the Court of Queen's Bench. The deposit of \$1,000 was made on the same day. The receipt for it was also headed in the Election Court, and was signed by Mr. Dalton as clerk of that Court.

The other facts sufficiently appear in the judgment.

*Britton*, Q. C., during this term, June 1, 1877, shewed cause. He objected that there was no jurisdiction to make the order. He filed several affidavits in answer, including one affidavit made by himself, contradicting the petitioner's statement.

Dr. *Stewart*, in person, contra.

June 30, 1877. HARRISON, C. J.—We ought not to make any order such as asked, unless satisfied of our jurisdiction to do so.

The Dominion Controverted Elections Act, which was in force at the time of the filing of the petition and depositing of the \$1,000, was 37 Vic. ch. 10. It was assented to on 26th May, 1874. It repealed 36 Vic. ch. 27, except only as respects elections held before the passing of the Act, and so repealed the provisions creating what before then was known as the "Election Court," and directed that all elections held after the passing of the Act, 26th May, 1874, should be subject to the provisions thereof, and should not be questioned otherwise than in accordance therewith.

One of these provisions is, that the expression "the Court," as used in the Act, shall, in the Province of Ontario mean any of the following Courts, viz.: "The Court of Error and Appeal, the Court of Queen's Bench, the Court

of Common Pleas, and the Court of Chancery, and the Chancellor and Vice-Chancellors of the said Court for the said Province: Sec. 3 subsec. 2.

Another, is that each of the Courts respectively shall, subject to the provisions of the Act, have the same powers, jurisdiction, and authority with reference to an election petition, and the proceedings thereon, as if such petition were an ordinary cause within its own jurisdiction: Sec. 3, sub-sec. 7.

The presentation of the petition is directed to be made by delivering it at the office of the clerk of the Court, during office hours, or in any other prescribed manner: Sec. 8 subsec. 3.

The security required was the deposit of \$1,000, "with the clerk of the Court"—Sec. 8 subsec. 6—who was required to give a receipt therefor, which should be evidence of the sufficiency thereof: *Ib.* subsec. 7.

The Court of Queen's Bench, on the application of the petitioner, refused to name a day for the trial of the petition, on two grounds, one of which was that there was no petition in the Court of Queen's Bench. See *Re Kingston Election*, 39 U. C. R. 139.

For a similar reason we, as Judges of the Court of Queen's Bench, must decline to make any order on the clerk of this Court to pay out any money which is not under the direct and immediate control of the Court.

Some confusion has arisen from the fact that the gentleman who is clerk of this Court was also clerk of the Election Court, constituted under the Act of 1873, and as such received the deposit in question, but sitting where we do we have no more power to order him to pay money which he received as clerk of the Election Court, than we would have to order the clerk of the Court of Common Pleas to pay out money received by the clerk of that Court as a deposit on proceedings pending in that Court.

The objection to the jurisdiction is therefore a good one and must prevail.



Having no jurisdiction to make any order on the present application, we must, under the circumstances, decline to make any order as to the costs of the application. See *Brown v. Shaw*, 1 Ex. D. 425.

MORRISON, J., and WILSON, J., concurred.

*Rule discharged, without costs.*

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DRIFFILL, ASSIGNEE IN INSOLVENCY OF COCKERLINE V.  
MCFALL.

*Trover—Conversion—Jus Tertii—Damages—Vendor's lien.*

C., on the 20th August, 1874, sold land to one G. for \$8,500, and took a mortgage on the property for \$6000, and two joint notes of G. and M. for the balance. These notes were handed by C. to defendant to keep for him, defendant being aware that he was in pecuniary difficulty, and a writ of attachment in insolvency issued against him on the 1st of September. The plaintiff being appointed assignee, demanded the notes from defendant, who disposed of them for C.'s benefit, with knowledge of the plaintiff's claim, and the plaintiff brought trover. It appeared that the plaintiff had filed a bill to set aside the sale of the land by C. as fraudulent, which suit was pending at the commencement of this action; and it was proved that the makers of the notes were worthless, unless they could be said to have a vendor's lien on the land for the amount unsecured.

*Held*, that defendant had been guilty of a conversion of the notes, for which, shewing no right or authority under the makers, he could not dispute the plaintiff's right to sue, notwithstanding the plaintiff was disputing the sale out of which they arose; but that the insolvent having taken a mortgage on the land for part of the purchase money, had waived his vendor's lien for the remainder.

The defendant having brought into Court one of the notes for \$1000, about the value of the lien if it had existed, it was ordered to be delivered to the plaintiff, and the verdict which had been rendered for \$1000, was reduced to nominal damages.

THE first count of the declaration alleged that after Mathew B. Cockerline became an insolvent the defendant converted to his own use and wrongfully deprived the plaintiff, as such assignee as aforesaid, of a large number of promissory notes.

The remaining counts were the common *indebitatus* counts for money had and received, money paid, &c.

Pleas: 1. That plaintiff was not assignee of Mathew B. Cockerline.

2. Not guilty, to the first count.

3. That the goods in the first count alleged were not the property of the plaintiff.

4. Never indebted, to the remaining counts.

5. Payment, to the remaining counts.

Issue.

The cause was tried at the last assizes for the county of Simcoe before Wilson, J., without a jury.

Cockerline, the insolvent, had been a mill owner doing business at Bradford. On 1st September, 1874, a writ of attachment in insolvency was issued against his estate and effects. He then absconded. The plaintiff afterwards was duly appointed the assignee of his estate and effects.

The insolvent, on 20th August, 1874, before the issue of the writ of attachment, had sold his mill property to one Joshua R. Goodwin, for the sum of \$8,500, taking a mortgage on the property for \$6,000, and two joint notes of Goodwin and David W. Moyes for \$1,500 (on which \$500 was paid), and \$1,000 respectively, dated 20th August, 1874, payable at three and five months respectively.

These notes with others were, after the sale, and before the issue of the writ of attachment, handed by the insolvent to the defendant to keep for him, defendant at the time knowing that the insolvent was in pecuniary difficulties.

The plaintiff shortly after his appointment received information which led him to believe that the defendant had some notes of the insolvent in his possession at Kleinburg. Plaintiff therefore wrote to defendant demanding all notes of Cockerline which he had in his possession. In answer defendant, on 10th November, 1874, wrote that he had none of Cockerline's property in his possession, care, or custody—"No notes, papers, moneys, or valuables of any kind." The plaintiff, on 11th November, 1874,

wrote defendant reminding him that he, defendant, had written to one Clerihue, stating that he had his notes, made to Cockerline, for collection, and asking defendant to explain about it. The letter then read as follows: "Will you be kind enough to inform me at your earliest convenience if Mr. Cockerline, since September 2, 1874, placed in your care or custody any notes, papers, or valuables of any kind, and if you have not got them now (as you say you have not) to whom did you give them, and where are they now?" Defendant by letter dated 13th November, 1874, answered: "I neither hold the notes you refer to nor any other notes, papers, moneys nor valuables, directly or indirectly, belonging to M. B. Cockerline, or his estate nor from any person on his behalf, nor does any person hold in trust for me the property of the above. By whom his property may now be held, or where, I am in perfect ignorance." The plaintiff again wrote, insisting that defendant had Cockerline's property, and asking for delivery of the same, to which defendant, on 25th November, 1874, replied: "As a finale I wish to say, I have none of Mr. Cockerline's property in my care, keeping, or custody, nor know of no person who has." Defendant admitted that the letter was written to Clerihue with his consent. The Clerihue notes were afterwards sent to plaintiff by Cockerline, and were collected by the plaintiff.

It appeared that while this correspondence was taking place the notes were in the possession of a brother of defendant in Toronto, to whom defendant had previously sent them by request of the insolvent. Shortly before Christmas 1874, the notes were, at the request of the insolvent, sent to one Scanlon in Buffalo.

The \$1,500 note, on which \$500 had been paid, got into the possession of one Ross, who procured from Goodwin a renewal note, on which he afterwards sued and obtained judgment.

The remaining note for \$1,000 was proved to have been sent, on 11th January, 1875, by one Pitterrell of Jarvis, claiming to be the owner of it, to the manager of the St. Lawrence Bank, at Bradford, for collection.

It appeared that neither of the makers of the notes was at the time of the alleged conversion able to pay the amount of the notes. Both were worthless.

It also appeared that the plaintiff filed a bill in Chancery to set aside the sale made by Cockerline to Goodwin as being fraudulent: that the suit was commenced in the fall of 1874 or spring of 1875, and was pending for about a year and a half, and in February, 1876, when this action was brought, but was afterwards dismissed.

The learned Judge held that the defendant was guilty of conversion. But he also found that the makers of the notes were, at the time of the alleged conversion, worthless, and but for the fact that in his opinion there was a vendor's lien on the mill would have rendered a verdict for the plaintiff for nominal damages only.

He found the mill to be worth \$7000; deducting the mortgage \$6000; balance \$1000.

He found that the mortgage for \$6000 had been reduced to about \$5800; balance \$200, leaving a surplus unsecured of \$1200.

He was of opinion that there was from \$1000 to \$1200 available to the unpaid vendor as a lien on the property, which the plaintiff had probably lost through the tortious conduct of the defendant.

He held that the fact that the plaintiff at one time disputed the validity of the sale did not prevent the plaintiff resorting to the notes, and that any improper disposition of the notes in the meantime might and did become wrongful by relation.

Upon the whole the learned Judge rendered a verdict for plaintiff for \$1000, being the supposed value of the vendor's lien.

During this term, May 25, 1877, *F. Osler* obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a verdict entered for defendant, pursuant to leave reserved and to the Law Reform Amendment Act, on the ground that there was no evidence of a conversion



by the defendant of the promissory notes of Goodwin and Moyes, and the plaintiff was not entitled to maintain this action for any alleged conversion thereof at the time the action was brought; or why the verdict should not be reduced to nominal damages, on the ground that the makers of the notes were shewn to be insolvent, and that no vendor's lien then existed or could have existed in favour of the plaintiff, and that the plaintiff had not by any alleged conversion of the defendant been deprived of a vendor's lien; or why, upon bringing into Court one of the said notes for \$1000, the verdict should not be reduced to nominal damages, or such other sum as the Court might think proper—upon reading the affidavit of the defendant, the said note, and other papers filed.

Among the papers filed was the note for \$1000, dated 20th August, 1874, at five months, signed by Goodwin and Moyes. Defendant by affidavit explained that it came into his possession after the trial, and that he was willing to deliver it to the plaintiff.

During the same term, June 5, 1877, *McCarthy*, Q. C., shewed cause. There was a conversion proved and there was a vendor's lien, and so the notes were of some value: *McDonald v. McDonald*, 16 Grant 678; *Burns v. Griffin*, 24 Grant 451. And whether or not, if the plaintiff had not been deprived of the notes by the wrongful conduct of the defendant he might have sued on the notes and procured judgments. He filed an affidavit shewing that another had sued the makers on the first note and procured judgment and execution against the maker of that note, but had not yet realized anything on the judgment.

*Osler*, contra. The defendant has not been guilty of a conversion. If guilty, the plaintiff, repudiating the sale out of which the notes arose, could not when the action was commenced maintain an action for the conversion. If such an action will lie, the damages should only be nominal, as the makers were insolvent, and there never was a vendor's lien in respect of the notes: *DeGear v. Smith*, 11 Grant 570; *Anderson v. Trott*, 19 Grant 619.

He also referred to *Mathew v. Sherwell*, 2 Taunt. 439; *Delegal v. Naylor*, 7 Bing. 460; *Sedgwick on Damages*, 6th ed., 609, 610.

June 30, 1877. HARRISON, C. J.—The first question is, whether the plaintiff is in a position to sue the defendant in respect of the conversion, if any, by defendant.

The defendant never had any better claim to the notes than Cockerline from whom he received them, and for whose benefit he held them, and for whose benefit he disposed of them after a knowledge of the claim of the plaintiff. Cockerline could not have disputed the assignee's right to the notes on the ground that the assignee was at the time disputing the sale out of which they arose, without at all events shewing some right or authority under the makers to do so: *Biddle v. Bond*, 6 B. & S. 225. Even if the assignee had succeeded in his effort to set aside the sale he would have been compelled to restore the notes. For that purpose, if for no other, he was entitled to demand the notes from Cockerline, who could not pretend to any title as against the assignee, and from the defendant to whom Cockerline had fraudulently given them, and who had no better title than the insolvent. The notes were certainly the property of the assignee as against Cockerline, and so were the property of the plaintiff as against the defendant.

But it is argued that there was no conversion of the notes proved.

Lord Mansfield, in the well known case of *Cooper v. Chitty*, 1 Burr. 20, 31, 1 Smith L. C., 7th ed., 488, defined the action of trover as being "in form \* \* a fiction, in substance a remedy to recover the value of personal chattels wrongfully *converted* by another to his own use."

The definition has never, that I am aware of, been questioned, but there have been great differences of opinion among Judges as to what facts are necessary in law to constitute a conversion.

Lord Ellenborough in *Stephens v. Elwall*, 4 M. & S. 259,

261, said, "The only question is, whether this is a conversion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master; but nevertheless his acts may amount to a conversion; for a person is guilty of a conversion who intermeddles with my property and disposes of it, and it is no answer that he acted under authority from another, who had himself no authority to dispose of it. And the Court is governed by the principle of law, and not by the hardship of any particular case."

This case, if still law, shews that defendant after a knowledge of the plaintiff's title was, whether the notes were demanded or not, guilty of a conversion in disposing of the notes contrary to the plaintiff's desire, although done upon the request of Cockerline, who had himself no authority to make such a disposition of them.

I find that the case has been approved in *Hollins v. Fowler*, L. R. 7 H. L. 757, now the leading authority on the point.

In that case it was held that any person who, however innocently, obtains possession of the goods of a person who has been fraudulently deprived of them, and disposes of them, whether for his own benefit or that of any other person, is guilty of conversion.

There were great differences of opinion in the case when in the Exchequer Chamber, L. R. 7 Q. B. 616, and even among the learned Judges who delivered their opinions to the House of Lords, but the above is the result of all their deliberations as determined by the highest Court of Appeal in England.

While the detention or asportavit of a chattel may or may not according to circumstances be a conversion—*Fouldes v. Willoughby*, 8 M. & W. 540; *Heald v. Carey*, 11 C. B. 977; *Simmons v. Lillystone*, 8 Ex. 431; *Burroughs v. Bayne*, 5 H. & N. 296; *Hardman et al. v. Booth*, 1 H. & C. 803; *Pillott v. Wilkinson*, 3 H. & C. 345; *Gilpin et al. v. The Royal Canadian Bank*, 26 U. C. R. 445, in Appeal 27 U.

C. R. 310; *England v. Cowley*, L. R. 8 Ex. 126; *Lindsay et al. v. Cundy*, L. R. 1 Q. B. D. 348, reversed L. R. 2 Q. B. D. 96; *Keith v. McMurray*, 27 C. P. 428—it is now settled law that the assumption and exercise of dominion over a chattel for any purpose or for any person, however innocently done if such conduct can be said to be inconsistent with the title of the true owner it is a conversion: *The Lancashire Waggon Co. Limited v. Fitzhugh*, 6 H. & N. 502; *Moffatt v. The Grand Trunk R. W. Co.*, 15 C. P. 392; *Coffey v. The Quebec Bank*, 20 C. P. 110, 555; *Hollins v. Fowler*, L. R. 7 H. L. 757. See further *Wilbraham v. Snow*, 2 Wms. Saund., ed. of 1871, 87.

Applying these principles to the decision of the case now before us, we entertain no doubt that the learned Judge on the evidence rightly found the defendant guilty of a conversion of the notes.

The next question is, as to the amount of damages. The value of the goods, or of the plaintiff's interest therein at the time of conversion, is in general the proper measure of damages: *Edmondson v. Nuttal*, 15 C. B. N. S. 280; *McAulay v. Allen*, 20 C. P. 417.

Where the property converted is a bill or note, or other security for money, the amount due on the security is *prima facie* the measure of damages. See *Mercer v. Jones*, 3 Camp. 477; *Greening v. Wilkinson*, 1 C. & P. 625. But the insolvency of the parties liable thereon, payment in whole or in part, or any other fact shewing the worthlessness or reduced value of the security may be shewn in mitigation of damages: *Mathew v. Sherwell*, 2 Taunt. 439, *Ingalls v. Lord*, 1 Cowen 240; *Romig v. Romig*, 2 Rawle 241; *Potter v. The Merchant's Bank of Albany*, 28 N. Y. 641; *Walrod v. Ball*; 9 Barb. 271; *Mayne on Damages* 2nd ed. 294, note *i*; *Parsons on Contracts*, 5th ed. vol. iii. 166; *Sedgwick on Damages*, 6th ed. 609, 610.

It is of course no ground for the reduction of the damages that the defendant has by his own act lessened the value of the bill, as by pledging a portion of it or otherwise: *Alsager v. Close*, 10 M. & W. 576.



Plaintiff may, in answer to the proof of insolvency or other apparent worthlessness, shew that there are special circumstances which notwithstanding would have made the bill or note of full value to the plaintiff if in his possession at the time of the conversion: *Delegal v. Naylor*, 7 Bing. 460: *Rose v. Lewis*, 10 Mich. 483; *King v. Ham*, 6 Allen 298.

Had it not been for the opinion of the learned Judge at the trial that the defendant had by his wrongful conduct deprived the plaintiff of a vendor's lien to at least the value of \$1000, the learned Judge would have found a verdict for the plaintiff for nominal damages only, because he was satisfied that apart from the lien, if any, the notes at the time of the conversion were worthless.

Now defendant brings into Court one of the notes, and asks to have the verdict reduced to nominal damages, on the ground that the insolvent having taken a mortgage on the land sold for \$6000 of the purchase money had thereby waived the vendor's lien as to the remainder of the purchase money.

A vendor's lien is raised by a Court of equity irrespective of contract, and is, on principles of equity, held to exist unless expressly waived or the facts be such that the Court can safely infer that it was waived: *Nairn v. Prowse*, 6 Ves. 752: *McDonald v. McDonald*, 16 Grant 678: *Burns v. Griffin*, 24 Grant 451.

Where a security has been taken for the purchase money it lies on the vendee to shew that the vendor, by taking the security, agreed to discharge the land from the lien: *Hughes v. Kearney*, 1 Sch. & Lef. 132.

It has been held that where the vendor took the joint and several promissory note of the vendee and a surety, he did not thereby waive his vendor's lien on the land: *Colborne v. Thomas*, 4 Grant 102.

Nor is it waived by the vendor suing and recovering judgment for the amount of the unpaid purchase money: *Flint v. Smith*, 8 Grant 339.

But in the old case of *Bond v. Kent*, 2 Vern. 281, it was

e! that a vendor who accepted the promissory note of the vendee for the purchase money and a mortgage on the land sold for the remainder of the purchase money, had thereby lost his lien.

If this be good law, as now understood and administered in Courts of Equity, it is decisive against the supposed vendor's lien in this case.

*Bond v. Kent* was cited and approved in *Hughes v. Kearney*, 1 Sch. & Lef. 132; *Eyre v. Sadlier*, 15 Ir. Ch. 1; *Rutherford v. Rutherford*, 11 Grant 565; *DeGear v. Smith*, 11 Grant 570; and *Anderson v. Trott*, 19 Grant 619.

In the latter, which is the most recent authority directly on the point, Strong, V. C., said, p. 620: "It seems clear, both on authority and principle, that a vendor who completes the sale, and takes a mortgage for a part of the purchase money, disentitles himself to a lien for the residue remaining unpaid and unsecured."

The lien being the creature of a Court of Equity cannot in a Court of Law, in this Province, be held to exist under circumstances when the last decision in the Court of Equity in this Province declares that it does not exist.

Besides the law is so laid down in the last (5th) edition of *Dart on Vendors and Purchasers*, p. 734, and the last (4th) edition of *White & Tudor's Leading Cases*, vol. i., pp. 300, 320. See also *Taylor's Equity Jurisprudence*, sec. 1039; *Story's Equity Jurisprudence*, 12th ed., sec. 1226.

The report of the case in 2 Vern. 281 is meagre and unsatisfactory. No reasons are given for the decision. But the reasons were probably those assigned by Lord Redesdale in *Hughes v. Kearney*, 1 Sch. & Lef. 132, 135, where he said: "In the case in 2 Vern. it was manifestly the contention of the parties that the amount of the note should not be a lien on the lands; else they would have had a mortgage for the whole: the seller took the estate for his debtor for a part of the purchase money, and was content with the note for the remaining part."

But in *Mackreth v. Symmons*, 15 Ves. 328, 341, Lord Eldon, after referring to *Bond v. Kent*, said: "It does not,

however, appear to me a violent conclusion, as between vendor and vendee, that, notwithstanding a mortgage, the lien should subsist."

An instance of the existence under special circumstances of the vendor's lien, notwithstanding a mortgage for part of the purchase money, will be found in *Rutherford v. Rutherford*, 11 Grant 565.

It seems clear that where a vendor takes a mortgage on the land sold for a portion of the purchase money, and no special circumstances in favour of the continuance of the lien for the unsecured portions are shewn that no lien exists.

No special circumstances were shewn in this case.

We must, therefore, hold that there was no lien in respect of the notes converted by the defendant.

It was in effect conceded at the trial that if there were no vendor's lien the notes were really valueless.

But, as argued before us, it does not follow that because two men are insolvent to-day they will continue to be so for twenty years to come. It is only fair to the plaintiff, therefore, as defendant has brought into Court one of the notes alleged to have been converted, to be delivered to the plaintiff, that it should be delivered to the plaintiff. It is for \$1,000, the amount of the verdict. It is not yet barred by the Statute of Limitations. It is not, so far as we are informed, released or barred by any insolvency or other proceedings. If so, there is nothing to prevent the plaintiff, if so disposed, suing upon it and recovering a judgment and hereafter endeavouring by execution to realize the amount thereof.

The rule will be absolute for the delivery of the note for \$1,000 to the plaintiff, and for the reduction of the verdict to one shilling damages.

MORRISON, J., and WILSON, J., concurred.

*Rule accordingly.*

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## GRAHAM V. THE GREAT WESTERN RAILWAY COMPANY.

*Railway—Collision of trains at level crossing—Liability.*

Defendants' railway crossed the track of another railway on the level, and both were bound by statute to stop at least a minute before crossing, but neither did so. Defendants' line was signalled as clear, and their train, in which the plaintiff was a passenger, went on without stopping. The other line was signalled as not clear, but the train on it ran on, disregarding this signal, and struck the defendants' train at the crossing, whereby the plaintiff was injured. If either train had pulled up about two seconds sooner the collision would have been avoided.

*Held*, that the defendants were liable to the plaintiff, for that their neglect to stop the required time was, so far as the plaintiff was concerned, a part of the cause of his injury and sufficiently proximate.

*Quære*, as to the liability as between the two companies.

ACTION for negligence. The cause was tried at London, at the last Spring Assizes, before Patterson, J., without a jury. The verdict was for the plaintiff and \$750 damages.

The negligence charged was that the defendants' line at Woodstock crosses, on a level, the track of the Port Dover and Lake Huron R. W. Co.'s line, and that the defendants did not stop their train for at least three minutes before crossing the track of the other railway company, by means whereof the defendants' train, on which the plaintiff was a passenger, was brought into collision with a train of the other railway company, and the plaintiff was injured.

The evidence shewed that a servant of the defendants had the charge of and was in charge at the time of the semaphore on the two lines of railway. On the defendants' line the semaphore east of the crossing is 653 feet 4 inches from the centre of the crossing, and that semaphore was *down*, indicating that the line for the defendants' train was clear. On the other line the semaphore north of the crossing is 528 feet 4 inches from the centre of the crossing, and it was very much disputed whether it was up or down; but the learned Judge found it was up, indicating that the line of that company was not clear.

The defendants' train was running from east to west at the time of the accident, so that finding the semaphore to the east of the crossing *down*, indicating that the line was



clear, it ran on westerly towards the crossing where the accident happened. The other railway train was running from north to south at the time of the accident. It had therefore to pass the north semaphore at a distance of 582 feet 4 inches before coming to the crossing, and that semaphore was *up*, indicating that that line of road was not clear for the train. The train, however, ran on, not regarding the signal, and struck the passenger car of the defendants' at the crossing, by reason of which the plaintiff was injured.

The plaintiff contended he was a passenger on the defendants' train, and was injured while such a passenger, because the defendants did not stop before crossing the other track the statutory period of three minutes, and that if such a delay had been made the accident would not have happened.

The defendants contended that although they should have stopped for three minutes before crossing the other track, their omission to do it was not the proximate cause of the damage: that the defendants' servant had properly managed the semaphores, which informed the defendants' train that there was no hindrance in the way, and which warned the other train that they should not go on, for there was danger ahead; and that it was the gross act of neglect of the other company, which disregarded the signal, that was the proximate and actionable cause of action.

During this term, May 25, 1877, *M. C. Cameron*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a verdict or nonsuit entered for the defendants, the verdict being contrary to law and evidence.

June 8, 1897. *Rock*, Q. C., shewed cause. It is of no consequence whether the 31 Vic. ch. 68, D., applies to the defendants or not, although it is contended it does not: see secs. 2, 4; and, therefore, whether the time that trains are required

to stop before crossing the track of any other company be limited to the one minute by sec. 62 of that Act, in place of the three minutes, or the defendants are still bound by the Consol. Stat. C. ch.<sup>e</sup> 66, sec. 143, which prescribes three minutes, is of no consequence, because the evidence shews the defendants' train did not stop at all before crossing the track of the other company; or if it did stop at all, as the defendants contended it did, it did not stop for one minute. There was, therefore, negligence on the part of the defendants, and they are answerable to the plaintiff, who was their passenger, for the injury he sustained: *Shearman & Redfield* on Negligence, 2nd ed., secs. 13, 484, 485; *Renaud v. Great Western R. W. Co.*, 12 U. C. R. 408; *Miller v. Grand Trunk R. W. Co.*, 25 C. P. 389; *Stapley v. The London and Brighton R. W. Co.*, L. R. 1 Ex. 21; *Lunt v. The London and North Western R. W. Co.*, L. R. 1 Q. B. 277.

*M. C. Cameron*, Q. C., supported the rule. The defendants were only to blame for not stopping one minute or three minutes before crossing the other company's track. They were not to blame in considering their line was clear, and in going on finding that it was clear, unless the damage resulted from not stopping the one minute before crossing the other track; and it did not result from that, but from the neglect of the other train to obey the signal to wait, and running into the defendants' car: *Wright v. Midland R. W. Co.*, L. R. 8 Ex. 137; *Wanless v. North-Eastern R. W. Co.*, L. R. 6 Q. B. 481; *Corris v. Scott*, L. R. 9 Ex. 125.

June 30, 1877. WILSON, J.—From the finding of the learned Judge, we must consider the case as if the semaphore on the defendants' line were down at the time their train passed it upon this occasion, and that the semaphore on the other line was not down at the time the train of the other company passed that semaphore, and that the train of that company disregarded the signal to wait and passed on, and the collision complained of happened.

Unquestionably if the defendants had stopped their train

for even the one minute the accident would not have happened, because the other train would have crossed the track of the defendants' line before the expiry of that minute; and the like may be said, that no accident would have happened if the other train had obeyed the signal to wait, or had stopped altogether for one minute before crossing the track at that place, as they were also bound to do.

Both companies were really in fault.

As between themselves, what would be their remedies and liabilities?

The mere fact that one has been negligent will not prevent that one from recovering against the other for negligence which has produced damage, unless the conduct of the one claiming compensation were of that nature that but for it the accident would not have happened; nor will that one be prevented from recovering if the other party, by the exercise of care on his part, could have avoided the consequences of the neglect or carelessness of the one complaining. That is the decision in *Tuff v. Warman*, 5 C. B. N. S. 573.

If the defendants' line were signalled as clear, and the line of the other company was signalled as not clear, the defendants were justified in passing the semaphore towards the crossing; the other company were not justified in doing so. The defendants then should have stopped for at least one minute before going over the cross track. *That* they did not do, and so far they were in default; but because they did not do so, the other company had no right to run their train into the defendants' train, if by the exercise of care on the part of the other company they could have avoided the consequences of the defendants' neglect or carelessness. Then could they have avoided it?

That question must be tried in like manner as it should be if the crossing had been over a highway on the level; and in that case the enquiry would be whether, notwithstanding the neglect of the defendants to sound the whistle, &c., the person injured could by proper care on his

part have avoided the train. Or it should be tried in like manner as if some one were going over this very crossing at the time and was injured.

If the defendants had not stopped for at least one minute, in such a case they might *primâ facie* be liable ; but if they shewed that, notwithstanding their neglect, the party injured by reasonable care could have avoided the train altogether, they would not be held responsible.

Did the defendants then bring about the injury done to them by their own conduct ?

The defendants' train was running on one line without regarding the statute as to stopping for a minute before crossing the other track. The other company's train was running on its line, not regarding the semaphore, and not meaning to stop at the crossing, as it also was bound to do. They are each bearing down to the same point, at which each should have pulled up and stopped for a minute. If either had done it there would have been no collision.

The plaintiff contends he may admit that the other company did not regard the semaphore, nor their duty to stop at the crossing, nor did they pay attention to the signs made to them to stop after the train had passed the semaphore ; but still, he says, no accident would have happened if the defendants had not also neglected to stop at the crossing, for if they had the other company, however much to blame for their carelessness and disregard of all warning, would have got over the crossing before the defendants had got to it—and that is correct. Each company in fact was travelling without regard to the statutory duty of stopping one minute before crossing the other line. The only case for the defendants against the other company is this : Could the other train, by reasonable care and attention on the part of those in charge of it, have prevented the collision if they had obeyed the semaphore ; or when they saw the defendants' train, or when they should have seen it if they had kept a proper look-out ; or from the time that warning was given to them by the flagman of the defendants, who waived his flag to keep them



from coming on ; or if the engineer had properly reversed his engine ? If they could, they would be answerable to the defendants for the injury the defendants sustained.

The learned Judge found all the above circumstances adversely to the other company.

The defendants might, therefore, be able to establish a case against the other company.

There is only one other circumstance to be mentioned, and that is the time that each train was at its respective semaphore, and the rate of their travel between that and the crossing.

The defendants' semaphore is 653 feet east of the crossing. The semaphore of the other company is 528 north of the crossing. The rate of speed of the defendants' train may safely be stated at twelve miles an hour, and that of the other company at about five miles an hour. The defendants' train was travelling at one mile in five minutes ; the other train one mile in twelve minutes.

The defendants' train would take about forty-threeseconds to run the 653 feet to the crossing ; the other train would take ninety seconds to run the 528 feet to the crossings.

The defendants' train was moving about fifteen feet per second. Allow seven seconds for the distance the chief part of the train had passed the crossing, and that will make fifty seconds from the time the defendants got to the semaphore till the collision at the crossing. The other train must therefore have passed its semaphore forty seconds before the defendants' train passed its semaphore. So that it was a neck-and-neck race between the two trains, unknown to those in charge of them ; and if the defendants had only been two seconds faster, or the other train two seconds later, all would have been well.

Granting that the defendants could recover for the negligence of the other company, notwithstanding the fact of their own admitted negligence by not stopping for one minute before crossing the line of the other company, is that an answer to this action by the plaintiff, a passenger on the defendants' line ?

That is a point which has occasioned me some difficulty and doubt. The defendants could only recover against the other company by shewing that the damage the defendants had sustained was occasioned by the wrongful act and neglect of the other company beyond any act of negligence or carelessness with which the defendants were chargeable. And if so, it may be said, why are the defendants to be answerable to their passengers for injury sustained by them in consequence of the wrongful act of the other company?

Without saying what greater liability there is on the part of a railway company to their own passengers than there is to others who are not under their care, and whether their responsibility to their passengers is in all cases to be determined and limited by the right which the company may have against any other company or person concerned in the wrongful act, it may not unreasonably be laid down that the company are bound to observe all matters of ordinary duty, whether established by statute or otherwise, towards their passengers; and that when there is a plain and positive obligation on their part to stop at least one minute before crossing the other track, which they did not do, and for the neglect of which there was no reason or excuse, and when by means of that neglect of duty the damage to the plaintiff would certainly not have happened, it is scarcely right that the defendants should claim to be exempted from liability to the plaintiff on the ground that they had well and faithfully done everything on their part to carry the plaintiff safely and securely, because they are able to say the other train should have pulled up two seconds sooner than it did; and so it was the fault of that company and not their fault.

I do not think it is reasonable that a company which has without cause violated its clear duty should be acquitted of accountability to their passengers, whose limbs and lives are in their keeping, for damage done to them because some other company or person was just two seconds too late in doing something which would have cured all their neglect. And that is the fact in this case.

If it had been an obvious case of misconduct by the other company, in which the neglect of the defendants could not fairly be said to have led to the accident, the defendants would, in my opinion, be excused from liability to the plaintiff. But I am not able to remove entirely from my mind the impression that the neglect of the defendants to stop for the required time before crossing the track was, so far as the plaintiff is concerned, part of the cause of his injury, and that it is sufficiently proximate to form an actionable ground for damages.

The case of *Wright v. The Midland R. W. Co.*, L. R. 8 Ex. 137, is the nearest one in its circumstances, but there the defendants were in no way whatever to blame.

I think the rule must be discharged.

HARRISON, C. J., and MORRISON, J., concurred.

*Rule discharged.*

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## McDOUGALL V. CAMPBELL.

*Counsel fees—Right of action for—Bill for divorce and alimony.*

*Held*, HARRISON, C.J., disssenting, that counsel in this Province have the right to maintain an action for their fees.

Defendant having presented a bill to the Senate for a divorce from his wife, the plaintiff was retained by the wife as counsel before the committee of the Senate to oppose the bill. The defendant being informed that he must pay from day to day into the committee the costs of his wife's defence, promised the plaintiff that if the plaintiff would not insist on defendant so paying his fees, he would pay them to the plaintiff when taxed. The committee having reported the preamble of the bill not proven, the wife applied to the Senate for a divorce and for maintenance, and retained the plaintiff to support such application. *Per* WILSON, J.—1. The Senate could have no power to award alimony, and the plaintiff could not recover for his fees in promoting a bill for that purpose; 2. If counsel fees could not be recovered by a counsel from his client, the plaintiff here could not recover upon this express contract; 3. The count, upon such express agreement, set out below, sufficiently shewed a right of action in the plaintiff against the defendant.

THE plaintiff sued the defendant for money payable by the defendant to the plaintiff for work, journeys, and attendances of the plaintiff, by him done and performed and bestowed as solicitor and counsel for the defendant's wife, and otherwise for the defendant, at his request.

There was also a special count in the declaration, in which it was alleged, that defendant petitioned Parliament for a divorce from his wife, and having presented a bill for divorce from his wife to the Senate at the session thereof now past, the bill was, pursuant to the rules of the house in that behalf, referred to a committee of the Senate, and the committee heard evidence in support of the preamble of the bill, and defendant's wife retained the plaintiff to act as her solicitor and counsel in opposing the passage of the bill for divorce: that the plaintiff accepted the retainer: that the committee reported the preamble of the bill was not proven: that the defendant was liable to pay the plaintiff for the services rendered to the defendant's wife: that defendant was informed by the committee that he would not be heard in support of the bill unless he from day to day paid the costs of his wife's defence: that thereupon defendant pro-



mised the plaintiff that if the plaintiff would not insist upon defendant paying an amount sufficient to cover the plaintiff's fees and charges as such solicitor and counsel, defendant would upon taxation of the plaintiff's bill of fees and charges forthwith pay the amount taxed. Then followed averments of performance of conditions precedent, and of non-payment.

Pleas to the common counts :—

1. Never indebted.

2. That before the causes of action the wife of the defendant had left the house of the defendant, and was living separate and apart from defendant by her own voluntary act.

3. That before the causes of action the wife had committed adultery with one Gordon, and left the house of the defendant, and was voluntarily living separate from him.

4. Denial that any bill of fees and costs had been delivered before action.

To the last count :—

1. *Non assumpsit*.

2. Denial of taxation as in that count alleged.

Issue.

The cause was tried at the last Toronto Fall Assizes before Morrison, J., without a jury.

It appeared that the plaintiff was a barrister, that as such he was retained by the wife of defendant to oppose the bill of divorce mentioned in the pleadings, and was also retained by her to support a bill for substantive relief after the failure of the plaintiff's bill.

The services rendered by the plaintiff under the first retainer were principally to examine witnesses, and this he did for seventeen days. He also addressed the committee as counsel for the wife.

The defendant was required by the committee, to whom the defendant's bill was referred, to deposit some money to cover the costs of witnesses. This he did to the amount of \$250. At a later stage the committee required a further deposit of money to be made to cover remaining costs. It was then agreed that the costs should at the close of the

proceedings of the committee be taxed by the chairman, and that defendant should then pay the amount.

The following was the bill rendered by the plaintiff to the chairman of the committee for taxation.

“In the Senate of Canada.

In the matter of the petitioner and bill for the relief of Robert Campbell.

Robert Campbell	} Retainer and counsel fees of respondent, the bill having been dismissed as against the respondent.
and Petitioner,	
Eliza Maria Campbell	
Respondent.	

Instructions to oppose and retainer ...	\$100.00
First day's attendance as counsel .....	100.00
16 days' attendance as counsel at \$50 per day .....	800.00
	<hr/> \$1000.00

This bill was taxed by the chairman of the committee at \$500.

The latter was the amount sought to be recovered under the special count contained in the declaration.

The services performed under the second retainer arose after defendant's bill was dismissed.

Plaintiff then advised defendant's wife to apply for a divorce *a mensâ et thoro*, and maintenance, and drafted a bill for that purpose. He appeared before the committee, submitted her bill, and pressed it upon the consideration of the committee. He was engaged seven days in this service. But the result was, that the committee decided to postpone further consideration of her case till the next session of Parliament.

The claim for these services was \$50 a day for seven days, \$350.

The learned Judge found a verdict for the whole amount claimed, \$850.

During Michaelmas term last, November 20, 1876, *Bethune*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside and a

verdict entered for the defendant, pursuant to the Law Reform Act, on the ground that the plaintiff was not entitled to recover at all, the agreement, if any, to pay being to pay the plaintiff's client, and not the plaintiff, and on the ground that the plaintiff could not recover at all, the action being for the recovery of counsel fees ; or why the verdict should not be reduced to \$500.

During Hilary term, February 8, 1877, *Spencer, Joseph McDougall* with him, shewed cause, before Harrison, C. J., Morrison, J., and Wilson, J.

The Court differing in opinion, and being equally divided, the case was argued again by direction of the Court in this term, May 26, 1877, before the full Court.

*Spencer* and *McDougall* for the plaintiff. The second count is founded on a special contract made between the plaintiff and defendant, and the defendant obtained the benefit of it. There is no reason why he should not pay the amount covered by that contract, \$500.

It is admitted that the rule in England is, that the counsel's remuneration is an *honorarium*, and as such that it cannot be sued for or recovered by legal process. The reason of this seems to be that payment of it should be secured in advance : *Morris v. Hunt*, 1 Chitty R. 544. This is properly a claim by the plaintiff on behalf of the defendant's wife for necessities supplied to her, and which may be recovered from him : *Rice v. Shepherd*, 12 C. B. N. S. 332 ; *Wilson v. Ford*, L. R. 3 Ex. 63. The rule which excludes a counsel from recovering by suit for his fees applies only to matters which are in litigation : *Kennedy v. Broun*, 13 C. B. N. S., 677 ; and in this case there was no litigation, because the Senate or the committee of the Senate has no judicial power ; and the proceedings which were carried on before it were not in the way of litigating any matter in a Court of justice, but for the passage of an Act of Parliament respecting the civil rights of the parties in their character of husband and wife.

In that proceeding the plaintiff was not acting as counsel. He was and is a counsel, but as the management of such

matters before the Senate and its committees is open to all persons, whether counsel or not, it cannot be said, and it should not be said in this case, that he acted then as a counsel, when the effect of it is to prevent him from recovering a claim he is justly entitled to on the express promise of the defendant to pay it.

Counsel fees were allowed to be proved for in bankruptcy proceedings against attorneys who had actually received payment from their clients of such fees. In *Re Hall*, 2 Jur. N. S. 1076, a proctor's claim for defending the wife in a suit for adultery instituted by the husband was allowed to be proved by the proctor against the husband's estate on his bankruptcy. See also *Ex parte Moore*, 9 Jur. 604, 14 L. J. Bankruptcy, 19; *Hobart v. Butler*, 9 Ir. C. L. R. 157, 166. In case of actual contract for payment of fees a physician may recover them at law on such contract: *Veitch v. Russell*, 3 Q. B. 928, 937. See also *North Victoria Election Case*, 39 U. C. R. 147. Admitting the law to be as it is in England, does that law prevail here?: *Baldwin v. Montgomery*, 1 U. C. R. 283; *Leslie v. Ball*, 22 U. C. R. 512; *Miller v. McCarthy*, 27 C. P. 147; *King v. Pinsoneault*, L. R. 6 P. C. 245, 259. The two professions of counsel and attorney are exercised here commonly by the same person, and there is not the same reason which there is in England, where the two professions are completely separated and cannot be carried on at the same time by the same person, for the application of the strict English rule. It is and must always be very difficult to draw the line between fees of one kind and fees of another kind which the client is liable for or has expressly promised to pay to the same person; upon some of which it is said he is liable, and upon others it is said he is not liable.

They also referred to *Egan v. The Guardians of Kensington Union*, 3 Q. B. 935, note; *Re Hall*, 2 Jur. N. S. 1076; Rules of the Senate, Rules 72, 73, 74, 79, 84; *Macqueen's House of Lords Practice*, 532; *Stevens v. Adams*,



23 Wend. 57; *Adams v. Stevens*, 26 Wend. 451, and cases noted in the American Reprint of 13 C. B. N. S. 742.

*Bethune*, Q. C., supported the rule. If this claim is established by the plaintiff, that he is as counsel entitled to sue for counsel fees by an action at law, the right must bring with it the corresponding responsibility of being answerable to his client for any neglect or failure of duty which may be imputed to him; and the question is one of great consequence to the profession.

The Senate has passed rules which apply to the position of the plaintiff when he was before the committee of that body. Rule 79 provides that "the counsel for the applicant as well as the party from whom the divorce is sought may be heard at the bar of the Senate, as well on the evidence adduced as on the provisions for the future support of the wife, if deemed necessary"; and rules 84-112 provide for a reference being had to the rules and decisions of the House of Lords in England in all cases where no special provision has been made by the Senate. *May's Parliamentary Practice*, 7th ed., 770, 771, shews that counsel will only be heard for the parties in such cases. See also *Macqueen's H. L. Prac.* 203, note.

The proceedings were of a judicial nature before the Senate, and the subject for consideration was certainly a matter in litigation, although the result of it was, that it should end in legislation or in the refusal of it.

The power to deal with "Marriage and Divorce," in the Confederation Act, conferred upon the Dominion Parliament the right to deal with these subjects, but not to entertain a bill for or to grant alimony to the wife, which the Senate assumed to do in this case, and for which \$350, part of the \$850 rendered as a verdict, was incurred by the wife alone without the authority of the husband, and for which the plaintiff as her counsel cannot make the husband pay: *L'Union St. Jacques de Montreal v. Belisle*, L. R. 6 P. C. 31.

It is not necessary, however, that the business with respect to which the fees are claimed should be in a

litigious matter to prevent the recovery of them by action, for it has lately been held that a conveyancing counsel cannot recover by suit his fees charged in the course of his business: *Mostyn v. Mostyn*, L. R. 5 Ch. 457. The position of a counsel by English law, which it is strongly contended is the law of this Province as well, is considered to be governed by the rules and practice of the Roman law, for which see *Kennedy v. Broun*, 13 C. B. N. S. 677; Lord *Mackenzie's* Roman Law 382; and *Gaius's* Institutes, 706. The law has not been settled differently in this country by the decision in *Baldwin v. Montgomery*, 1 U. C. R. 283. That case merely determined that fees paid out to others for the client, or taxed in favour of the client against the adverse party, could be sued for by the counsel and attorney of the client by reason of the 2 Geo. IV, ch. 2. The Court distinctly declared that in all cases not within the statute the law on the subject applied here equally as in England. *Re C. K. & C.*, 6 P. R. Rep. 226, before Blake, V. C., certainly expresses the opinion of that learned Judge, that counsel fees are not to be regarded as an *honorarium* since our legislation on the subject and the manner in which the Court has dealt with such fees by its general orders: *Taylor's* Chancery Orders, p. 36; Chancery Act, Consol. Stat. ch. 12, sec. 74. On the right of a counsel to recover his fees he referred to 29 Law Mag. N. S. 295. He also cited *May's* Parliamentary Practice, 4th ed., 344, 373, 682, 730.

June 30, 1877. WILSON, J.—The claim made by the plaintiff is, to recover from the defendant two sums of \$350 and \$500, making together the sum for which the verdict was rendered.

The \$350 is claimed upon the first count "for work, journeys, and attendances of the plaintiff, by him done, performed, and bestowed as solicitor and counsel for the defendant's wife, and otherwise for the defendant at his request." And the sum of \$500 is claimed upon the second count, upon the special promise of the defendant to pay the

taxed costs of the defendant's wife to the plaintiff in an enquiry which was held before a committee of the Senate on the defendant's bill founded on his petition, praying for a divorce from his wife for adultery, and which his wife, by the plaintiff as her counsel and solicitor, was opposing, "if he, the plaintiff, would not insist upon the defendant paying an amount sufficient to cover the plaintiff's fees and charges as such solicitor and counsel into the hands of the clerk and treasurer of the committee," the defendant having been "informed by the committee that he would not be heard in support of his bill unless he paid over to the committee from day to day an amount sufficient to pay the costs of his wife's defence in the matter of the said bill."

The first count is based upon the common law liability of the husband for the costs of the plaintiff prosecuting on behalf of the defendant's wife a bill before the Senate for a divorce *a mensâ et thoro*, and for a suitable alimony, and for the custody of some of her children,

The second count is based upon an express contract for the costs of opposing the defendant's bill for a divorce from his wife, who was the plaintiff's client. But the plaintiff bases this promise to himself upon the common law liability of the husband to pay such costs for his wife. At the common law the husband is liable to pay the costs of proceedings taken by the wife to procure a divorce *a mensâ et thoro*, if there was reasonable ground for such a measure and it was for her protection; for it being necessary that she should proceed in that way against her husband, the law gives her authority to pledge her husband's credit for the expenses of the proceeding: *Brown v. Ackroyd*, 5 E. & B. 819; *Wilson v. Ford*, L. R. 3 Ex. 63; *Rice v. Shepherd*, 12 C. B. N. S. 332. The husband by the practice of the Ecclesiastical Court is liable to pay the costs of his wife who is proceeded against for adultery although the wife is convicted: *Wells v. Wells*, 1 Sw. & Tr. 308; *Keats v. Keats*, 28 L. J. Prob. and Mat. Cas. 57; *Evans v. Evans*, 1 Sw. & Tr. 328; *Ward v. Ward*, 29 L. J. Mat. Cas. 17; that is, the process of that Court

will be issued against the husband to compel such payment. But I doubt if an action at law would lie by the wife's proctor against the husband to compel payment of her costs as a defendant when the suit had gone against her, any more than the husband would be liable for necessaries for his wife after she had been removed from his house for adultery: *Ex parte Moore*, 9 Jur. 604; *Brown v. Ackroyd*, 5 E. & B. 819. In practice in that Court the costs of the wife are commonly ordered to be paid by the husband *de die in diem*: *Ex parte Moore*, 9 Jur. 604; *Keats v. Keats*, 28 L. J. Prob. and Mat. Cas. 57; and unless that be done the Court will not usually order the husband to pay his wife's costs: *Keats v. Keats*, 28 L. J. Prob. & Mat. Cas. 57; *Conradi v. Conradi*, L. R. 1 P. & D. 163. So that although the wife be guilty her proctor is secured in all his costs for her by that repayment.

It was not shewn at the trial why it was the husband's bill failed, or why it was the petition of the wife for a divorce *a mensâ et thoro* was not proceeded with. The printed journals are not, like the printed statutes, proved by the production of a copy published by the Queen's printer, and therefore a sworn copy of the journals should have been produced: *Jones v. Randall*, Cowp. 17. There was no evidence given at the trial to shew the wife was petitioning for a divorce *a mensâ et thoro* on any reasonable or just grounds. The fact that the petition was not proceeded with (for some cause which we do not judicially know) is some evidence against her, although I do not think it is conclusive. But in the absence of all evidence on the subject, shewing that she was justified in taking the proceeding which she instituted against her husband, it cannot be said the plaintiff has established his right strictly at the common law to recover the costs of such proceedings against the husband, on the ground that the proceedings were necessary for the wife's benefit and protection, and that she had, therefore, the authority of her husband by implication to take and carry on such proceedings on his credit and at his expense.



If such a proceeding by the wife be one which she was warranted in taking, and is to be considered as in the light of "a necessary" for her welfare and protection, and for which therefore her husband would be liable, it may be that the remedy against the husband is not diminished by the legislation as to the rights of married women, although it may be she is also liable to the plaintiff for her separate debt, engagement, and contract, as if she were unmarried.

It would be necessary, I think, on this count to ascertain how much, if any, of the charge made was for the claim for a divorce *a mensâ et thoro*, and how much for the claim for alimony and the custody of the children; because I am strongly impressed with the opinion that the Senate has no more claim to award alimony and to decide upon the custody of the children than it would have to devise a scheme for the education of the children, or to fix the times and places the father should have access to them, or to appoint the form of religion in which they should be brought up. These are matters with which our tribunals are better calculated to deal, and which I say without any reserve they understand better than the Senate possibly can do.

Such an enactment would, if my view of the powers of the Senate be correct, be disregarded by the Courts here. It would not be allowed to overrule the decision of our own Court, which has deliberately pronounced against this claim for alimony, which the Senate seemed ready to grant.

The plaintiff cannot therefore recover for a proceeding which was not only unconstitutional but in disregard of the authority of our Courts.

As to the second count, which relates to the defendant's petition and bill for an absolute divorce, it was proved that the defendant was prevented from prosecuting his bill any further until he should pay in to the treasurer of the committee a further sum than the \$250 he had already paid, and in order to avoid a failure of his bill from the want of funds it was proved that if he were allowed to go on with his case he promised to pay to the plaintiff such costs

as he, the plaintiff, was found entitled to receive from his client, the defendant's wife, upon the taxation of his bill of costs; and upon that agreement the defendant did go on with his case, and so got the benefit of the agreement. The plaintiff has had the costs for such matter taxed at the sum of \$500, and the defendant refuses to pay the amount.

The causes of refusal are upon the legal grounds that the plaintiff is suing for the recovery of counsel fees, and the law does not permit an action to be brought for them, and that the defendant is not liable to the plaintiff upon the promise which he made. The like objection as to the inability to sue for counsel fees is made also to the recovery upon the first count. I will consider that objection in a little. The second count shews the defendant was not the client in fact of the plaintiff. It also shews that there was an express bargain made between the plaintiff and the defendant about these items of charge, and that the defendant received a special benefit as the consideration for his promise to pay, and upon such promise founded upon the consideration which was beneficial to him he was permitted to prosecute his case without the payment of the money beforehand. It is not quite clear that the rule which applies to counsel or advocate and client can apply here, because there is no such relationship in fact existing between the plaintiff and the defendant.

They were on the contrary adverse parties, with hostile interests, and dealing at arm's length. There was no stipulation for hire, reward, or *honorarium* to be paid to the plaintiff for his advocacy or services, for the defendant. There was at the most a bargain that for the special benefit given to the defendant, the non-payment of so much money down from and out of which the plaintiff's fees would have been paid, the defendant should at a later time pay those fees to him on taxation. There was a bargain *about* counsel fees, but not made with the client, nor in consideration of services as counsel, either rendered or to be rendered, but in consideration of the forbearance given

to the defendant for the payment of money. I am disposed, however, to think if counsel fees cannot be made the subject of contract at all, that whatever objection there is to the counsel suing his own client for his fees must also exist where the counsel (upon a special bargain such as there is here) is made between the counsel and the opposite party upon any consideration whatever, although it has no relation to services to be rendered by the counsel for such other party. In the ordinary case of security for costs being ordered to be given, it seems rather incongruous that the defendant's counsel should agree with the plaintiff to dispense with the security upon the condition or consideration of the plaintiff agreeing to pay the counsel's taxed costs if the defendant succeeded in the action.

A promise made by a third party for the client, to pay the counsel his fee in consideration of his undertaking the cause, must as a rule give no better cause of action against such third person than it would against the client himself. In that case the contract would be founded upon the consideration for the counsel's services.

In my opinion the promise of the defendant to pay the plaintiff's counsel fees, although he was not the client of the plaintiff, and although it was founded on a consideration of personal and special benefit to the defendant, cannot be enforced against him by action if they cannot be enforced against the client upon an express promise; because the like law must prevail (if it be the law here) in both cases, for the like objection exists to the maintenance of the action in the one case as in the other, that counsel fees (unless given by the statute), are not the subject of contract, and cannot therefore be sued for either at law or in equity.

There is another point relating to the second count to be considered before I refer to the general law relating to counsel fees. It is whether the plaintiff is the proper person to sue for the cause of action therein stated? To raise that question the rule should properly have been to arrest the judgment; but the objection is taken that "the

argeement, if any, is to pay the plaintiff's client and not the plaintiff." The rule should, therefore, be amended to give the defendant the benefit of the objection he has taken in express terms. The count states what would be a cause of action in the wife alone, assuming for the present that she could sue her husband upon it, but for the allegation that "the defendant was liable to pay the plaintiff for the plaintiff's services rendered to the defendant's wife in the matter of the defendant's application for divorce," and which application, it is averred, failed before the Senate. Does the allegation that the defendant was liable to pay the plaintiff for his services for the defendant's wife on the said application make any difference?

There are no other facts stated to support that allegation than that the defendant was applying for a divorce for his wife, and that she opposed it by the plaintiff whom "she retained to act for her as her solicitor and counsel."

In the first count the plaintiff relies upon the defendant being liable because the services were rendered for the defendant's wife "at the defendant's request."

The ordinary form of common count alleging the services to have been rendered for the defendant himself would suffice in such a case. His liability to pay by reason of his wife's agency would be a matter of evidence to sustain such a count. The fact of the retainer *by* the wife to act *for her* would be true even if she acted as the agent of her husband, and he was liable by reason of that agency.

Then does the count shew the wife retained the plaintiff in a matter in which the husband would be liable for her retainer. I think it does. She was bound to defend herself, as in *Ex parte Moore*, 9 Jur. 604, and the fact which is stated in the count, that the husband failed in the proof of his charge in the opinion of the Senate, shews a *prima facie* case of innocence of the wife of the charge which was made against her, and a case therefore in which the husband would be liable to pay the costs of his wife.



The count is therefore sufficient on its face, as disclosing a cause of action by the plaintiff against the defendant, by reason of the implied agency of his wife to render the services which are charged for. It is also sufficient because it shews a liability of the defendant to pay *de die in diem*, and his promise to pay at a future day in place of requiring him to pay at once is a good consideration for the promise, and it is a promise to the plaintiff who was impliedly acting on the credit of the husband.

Then as to the general question of counsel fees. Before dealing with it I may say at once that I am of opinion the plaintiff was retained because he was a counsel and solicitor, and that he acted as such throughout these proceedings. He has also rendered his bill for services performed as a counsel and solicitor, and he has declared in that character. I may say also at the outset that we must accept as the law of this Province that by the general rule and law applicable to such fees, independently of our own legislation, they cannot be sued for, at law or in equity, either upon an implied or an express promise. The propriety of that rule in its generality I confess to be open to objection in my opinion. It is not the rule in most of the States of the American Union of which we have any reported decisions, and the Imperial Parliament has altered it with respect to physicians; and there was authority before the case of *Kennedy v. Broun*, 13 C. B. N. S. 677, that on an express promise counsel fees could be recovered by action, by numerous decisions and *dicta* to that effect, which are referred to in the case just mentioned, ancient and modern; and I also refer to the 29 Law Mag. N. S. 295, cited by Mr. Bethune, in which there is a very good article on the subject.

It is not a fact that counsel give their time and intellect for a mere *honorarium*, and it would not detract from their dignity or from the honour of their profession, nor would it impair or endanger the due administration of justice, if counsel, like the rest of mankind, were entitled by law to claim, and, if necessary, enforce payment of the

reward which they had faithfully earned, and which was dishonestly withheld from them. It is not worth while to keep up a fiction against the actualities and realities of life that counsel do not, like other men, work for money, and need not be paid unless the clients as a mere favour choose to pay them; for it is notorious if they were not paid they would not work. The whole case of *Morris v. Hunt*, 1 Chitty 544, is against the idea of working for nothing. It inculcates the safer rule of getting payment beforehand; but if payment cannot be got beforehand that is no reason why it should not be got at all. That the existing mode of getting payment of these fees is a sufficient remedy for the counsel is one thing, but to call such fees an *honorarium*, when they are in truth a compulsory payment, is quite another thing. No one can doubt that if the present method of enforcing payment did not answer the purpose in a kind of way, imperfectly in some cases, that the whole body of counsel would, as the physicians have done, go to the Legislature for authority to be placed on the common footing of other people. It is to a great extent a fallacy also to say that counsel fees cannot be sued for at law. They are sued for every day in the year. In England as a rule the client does not confer directly with the counsel. He goes to an attorney or solicitor and lays his case before him. The attorney prepares a written case, and lays it before counsel for his opinion, and he pays the counsel his fees for his opinion, and when the case is ready for trial or argument the attorney prepares a brief and delivers it to the counsel along with his fee.

The attorney knows he is obliged to pay the counsel, and that he could not get the counsel to do one act for him if he did not pay him.

The client is bound by law to pay all these counsel fees. The counsel cannot sue him for them, but the attorney who has paid them for him can sue him by calling them "money paid for the client at his request."

Now that was a mode of procedure unknown to ancient

Rome. It is a growth of later time, and it answers the purpose reasonably well.

Again, by the judgment of the Court the losing party is condemned to pay his opponent's costs, including the counsel fees which his opponent has paid, and if the loser do not pay them an execution against his body, lands, or goods, may be issued to compel him to pay them.

If I were not bound to take the general law as it is, I should not do it, simply because it does not seem right or necessary to take any one's services on the promise of payment, and when he refuses to pay for them that he should be protected by law in his breach of faith; nor is it right or necessary that the one who has given his services upon such a promise—express or implied is of no consequence—should be prevented by law from compelling payment; and because also the whole transaction is contrary to the real truth and fact. But it is said that if counsel are enabled to make their clients pay them, the counsel will be liable to the client for any alleged neglect or misconduct of the cause. I do not see any hardship or injustice in that. It is simply putting the counsel on the footing of other men in every station and business of life.

Our legislation is as follows: By the C. L. P. Act, sec. 332, the Judges are authorized to frame a tariff of costs for the County Courts, to ascertain, determine, declare, and adjudge all and singular the fees allowed to be taken by counsel, &c., in respect of any business done or transacted in the said Courts.

And by section 333, sub-section 4, the Judges have authority to fix the fees and costs to be allowed for and in respect of the matters in the Act contained and the performance thereof.

And in pursuance of these powers the Judges have framed a tariff for the regulation of counsel fees in the County Courts and in the Superior Courts of Common Law.

By the Consol. Stat. U. C. ch. 119, sec. 1, the Superior Courts of Common Law had also power to declare the

fees to be allowed to any counsel, &c., &c.. in criminal and revenue matters. That power has been taken away by the 32 Vic. ch. 11, O., so far as sheriffs are concerned, but not so far as counsel and attorneys are concerned.

The Court of Chancery has also by general orders in like manner provided for the payment of counsel: *Taylor's* Chancery Orders 286, 398; and the orders 553, 608 and the tariffs framed under them. And the Court has general statutory power to provide for the allowance of costs in all matters.

The Dominion Controverted Elections Act of 1874, 37 Vic. ch. 10, sec. 60, provides also for the taxation of costs according to the same principles as costs are taxed between parties in actions at law, and they may be recovered in the same manner as the costs in an action at law.

And the Ontario Legislature has also provided, by the 34 Vic. ch. 3 sec. 44, that the costs in controverted election cases shall be taxed according to the same principle as costs are taxed between solicitor and client in the Court of Chancery, and that they may be recovered in the same manner as the costs of an action at law.

I consider therefore that the Legislature having dealt with the subject of costs in every Court of civil or criminal jurisdiction, and provided for the payment of counsel along with attorneys, solicitors, and the officers of the Court, have shewn that they intended counsel to be paid for their services as a matter of claim and right, and not by way of gratuity.

I have felt some difficulty in coming to the conclusion that counsel can maintain an action in this country for their fees, contrary to the general law declared by the celebrated case of *Kennedy v. Broun*, 13 C. B. N. S, 677. But counsel are so differently circumstanced here from what they are in England that I am obliged to decide as I have said. The joinder of the two professions of attorney and counsel makes a remarkable difference between the patron or advocate of ancient Rome, and the English counsel and our own counsel; and it is scarcely reason-



able, when the two professions are united, to require a distinction to be made by the professional man between one class of items in his bill of costs and another. Why if the same person get the charge for drawing pleadings, and record, a demurrer-book and brief, should he not also get the charge for conducting the trial on that record, or for arguing the demurrer? Then the statutes and rules of Court have provided, as already mentioned, for counsel being paid, so that they have a vested cause of action for their fees by force of the statute in some cases, as has been decided in *Baldwin v. Montgomery*, 1 U. C. R. 283. Why should there be any distinction between one fee and another fee? Why should one be an actionable item and another not? Why should a fee for defending a man successfully for an assault in a civil action be a charge which the counsel can sue for, and the like fee be not equally recoverable when the defence has failed?

The fact that the client can tax such fee on entering his judgment against the plaintiff can be no satisfactory reason why the counsel should be able to sue his client for it if the right to sue at all for it is a prohibited proceeding. The counsel's labour and his merit to reward are just the same whether he is successful or unsuccessful. To decide in any other way is to introduce the very mischievous rule that the right of the counsel's recompense is to be dependent upon the result of the suit.

And so also, if the counsel can recover his fee by suit in defending an assault, why should he not also recover it for defending his client on a charge for murder? The moment the rule is broken in upon it is gone, the idea of an, *honorarium* is abandoned. The legislation on the subject, which in my opinion is of a radical nature, has settled it and to continue the notion of an *honorarium* under such circumstances is to create an inconsistency and to occasion an injustice.

In my opinion counsel fees are recoverable by action in this Province. I do not imagine any calamity will result from a decision to that effect to the bar, to the Court, to the

administration of justice, or to the country. It is in accordance with and is necessitated by the legislation on the subject, and it is in accordance with the actual facts and experience of business.

From what I have already said there must be a new trial, to determine whether the special count can be maintained or not—that is, by proof being given that the wife had a reasonable ground for petitioning for a divorce *a mensâ et thoro* or not, and for the purpose of separating that part of the claim, if it is recovered for, from that part of it which is made for procuring alimony and the custody of the children.

As to the other count, the claim made may be enforced although the business is not yet concluded, because it is not reasonable the plaintiff should wait the end of that litigation, and because the time has come when the defendant promised to pay,—the taxation of the costs at which he attended; and it may be enforced whether the wife be guilty or not guilty of the charge made against her, because whether guilty or innocent the defendant was bound to pay down day by day the costs of her defence, and that payment was delayed at his request upon his promise to pay the amount at a time which has now gone by.

I may be allowed to say that a pre-payment to counsel has often acted very unfairly upon the client. A counsel when he has been appointed a Judge does not refund the fees which have been paid to him, although he has not done a single act to entitle him to retain them, and it was mentioned as a very unusual act that when Cresswell, J., was raised to the bench he returned to the respective parties the whole of the fees which he had not earned, and it was mentioned at the same time as an act very greatly to his credit and character. Now surely it cannot be right that counsel should have it in their power to commit so great an act of injustice.

As the plaintiff now agrees to enter a nonsuit as to the first count, the rule will be discharged, the plaintiff entering a nonsuit as to that count.

MORRISON, J., concurred.

HARRISON, C. J.—I am obliged to dissent from the opinions of my learned brothers in this case.

The plaintiff's demand consists of two parts: first, on an alleged express contract to pay for the services of opposing the husband's bill for divorce: second, for services thereafter in promoting a bill of the wife for a divorce *a mensâ et thoro* and maintenance.

It does not appear to me that these claims are necessarily governed by different considerations.

The question is not, in my opinion, as to the power of the wife to pledge the credit of the husband for either class of services, but as to the power of the plaintiff to contract in respect of future payment to him for the services.

The plaintiff is a barrister. The services sued for were performed by him as an advocate and not as an attorney, arbitrator, returning officer, or as holding any other office not connected with advocacy. And so in his bill, as well as in his evidence, the fees for which he sues are rightly described as "counsel fees."

Proctors were officers connected with the Ecclesiastical Courts, while these Courts existed, but their duties corresponded with those of attorneys in the Common Law Courts, and in fact attorneys and proctors now alike practice in the Court of Probate: *Brown's New Law Dictionary* and *Institute of the whole Law*, title, "Proctor."

*Ex parte Moore*, 1 De G. 173, which decides that where a husband sued his wife in an ecclesiastical Court for a divorce on the ground of adultery, and where before decree the husband became bankrupt and discontinued the suit, the proctor may prove against the husband's estate for the amount of his bill of costs, is not therefore an authority in favour of the present plaintiff.

The general term lawyer embraces the two great divisions of barristers or counsel and attorneys or solicitors. Both are figuratively said to be branches of the same profession. But each branch, improperly so

called, as regards rights, powers, and duties, widely differs from the other. They are in fact as in name distinct callings, governed by distinct rules, and subject to different considerations of policy. The qualities necessary for success in each are by no means the same; for it is well known that a man may be a good attorney who would make an indifferent barrister, and *vice versa*.

It has been found that in large communities division of labor is conducive to excellence. In England the calling of a barrister so much differs from that of an attorney that the same man is not allowed at the same time to practise the two professions. But in this Province there has been nothing hitherto to prevent barristers forming partnerships with attorneys, or to prevent the same man being both a barrister and an attorney.

One argument on behalf of the plaintiff is, that because in this Province the same man may be both a barrister and an attorney there should be no difference in this Province between the rights, powers, and obligations of a barrister and an attorney.

There was a time in English history when there was nothing to prevent barristers communicating directly with their clients: see *Marsh and Rainsford's Case*, 2 Leonard 111, S. C. *sub nom.*, *Marsh v. Kavenawood*, Cro. Eliz. 59. And to this day in England although against etiquette it is not against law for a barrister to do so: *Doe d. Bennett v. Hale*, 15 Q. B. 171, 183. It is neither against etiquette nor law for a barrister in this Province to do so. And this is especially the case where the same person is both a barrister and an attorney in the cause or matter in litigation.

A marked distinction between the two professions, which from the earliest period has existed in England, is this, that while the right of an attorney or solicitor to sue for his fees has never been doubted, the right of a barrister or counsel to sue for his fees has seldom been affirmed.

While the general rule is that any man who does work for another at his request may sue for the value of his services, there have always been two exceptions at the



common law, and these are, barristers and physicians: see *Poucher v. Norman*, 3 B. & C. 744.

The cause assigned for this exception in the case of a barrister is, that he should be rendered as independent of the result of litigation as the Judge or jury who try a cause, and therefore his exertions should not be made to depend upon the prospect of payment of fees. See *Morris v. Hunt*, 1 Chitty 544; *Re North Victoria Election Case*, 39 U. C. R. 147.

In 3 *Black. Com.* (by Kerr 3rd ed.) 28, it is said "It is established with us, that a counsel can maintain no action for his fees; which are given not as a *locatio vel conductio*, but as *quiddam honorarium*; not as a salary or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation."

In *Re May*, 4 Jur. N. S. 1169, on a petition presented by a barrister for payment of his fees the Court was urged to exercise its general jurisdiction over the attorney as an officer of the Court to compel payment, but Kindersley, V. C., said, "I hope the time will never come when such a rule is established. I will never make a precedent. If you bring me precedents, and establish your case, I must make the order; but I will never willingly derogate from the high position in which a barrister stands, and by which he is distinguished from an ordinary tradesman."

So in *Re Angell*, 6 Jur. N. S. 1373, the Court of Common Pleas refused to make an order on the attorney for payment of barrister's fees, although it was alleged that the attorney had received from the client the money to pay them.

In the celebrated case of *Swinfen v. Lord Chelmsford*, 5 H. & N. 890, 920, Pollock, C. B., expressing not only his own opinion but that of such eminent judges as Barons Martin, Bramwell, Wilson, Channell, and Wilde, said, "We are all of opinion that an advocate at the English bar, accepting a brief in the usual way, undertakes a duty, but does not enter into any contract or promise, express or implied. Cases may, indeed, occur where, on an express

promise, if he made one, he would be liable in *assumpsit*; but we think a barrister is to be considered, not as making a contract with his client, but as taking upon himself an office or duty, in the proper discharge of which not merely the client, but the Court in which the duty is to be performed, and the public at large, have an interest."

If there be the power to contract, the duties must be reciprocal. If it be held that a barrister may sue for his fees, it must also be held that he may be sued for breach of the contract of hiring and service.

The law in England is clear, that in the absence of express contract a barrister has no right to sue for his fees, and it appears to be equally clear that in England he has no power to make an express contract for future payment of fees.

In the well-known case of *Kennedy v. Broun*, 13 C. B. N. S. 677, the plaintiff, who at great length and at various times in Trinity and Michaelmas term 1862 shewed cause to a rule to set aside a verdict in [his favour for £20,000. counsel fees, on an express contract to pay them, admitted that a barrister in the absence of express contract has no right by the laws of England to sue for his fees.

In support of his argument that there was the right to sue on an express contract he referred to several authorities, including *Veitch v. Russell*, 3 Q. B. 928, and *Hobart v. Butler*, 9 Ir. C. L. R. 157; but the Court, notwithstanding some *dicta* to the contrary in some of the cases cited, unanimously held that a promise by a client to pay money to counsel for his advocacy, whether made before, during, or after the litigation, has no binding effect: that the relation of counsel and client *renders the parties mutually incapable of making any contract of hiring and service concerning advocacy in litigation*; that a special contract differs from an implied contract only in the mode of proof; that incapacity depends on the subject matter of the contract, not on the mode of proof, and that where there is incapacity "words and implication are alike nullities," and "no contract can result."

Although the Court anticipated that the plaintiff would, owing probably to his well known ability and great pertinacity, have appealed the case, and for that reason, under the authority of *Betts v. Menzies*, 1 E. & E. 990, reserved a portion of the rule, if necessary, for further consideration, no appeal, so far as I can learn, ever took place.

In *Mostyn v. Mostyn*, L. R. 5 Ch. 457, 459, Lord Justice Giffard, in referring to *Kennedy v. Brown*, said, the case "is most accurate in reasoning and sound in law, and that case forms a landmark of the law on this subject. Such applications as the present (an attempt by a conveyancing counsel to prove the amount of his fees against the estate of a testator) have, I believe, never succeeded; and speaking for myself, I may add that I hope never to see the day when a counsel coming into Court to enforce his claim for fees, as such, against the client will be successful."

*Mostyn v. Mostyn* has not, so far as I am aware, been questioned by any Court or Judge, and may therefore be adopted as unquestioned law.

It is, however, argued that the incapacity if any, of the barrister to contract for the future payment of counsel fees is limited in its operation to services "in litigation," and that the services sued for here do not come under that description.

While there is some authority for the support of this distinction, the weight of authority is entirely opposed to it.

In *Poucher v. Norman*, 3 B. & C. 744, where it was held that a certificated conveyancer may maintain an action for fees, it appears from the judgment of the Court that the conveyancer in that case was "not a barrister."

In *Re Hall*, 2 Jur. N. S. 1076, it was held by commissioner Fane, sitting in bankruptcy, that a conveyancing counsel had the right to prove against the bankrupt estate for fees due to him, but this decision is at variance with the ruling of the Lords Justices in *Mostyn v. Mostyn*,

L. R. 5 Ch. 457. The latter being the decision not only of higher authority than that of a commissioner in bankruptcy, but of a Court of Appeal, must be held to overrule and supersede the former decision.

Reference was made in the argument to some United States decisions, and we were asked to follow them because of the supposed similarity of circumstances of this country and of the United States.

But the United States decisions are not uniform. See the cases collected in the United States reprint of *Kennedy v. Broun*, 13 C. B. N. S. 742.

One of the earliest cases is *Brackenridge v. McFarlane*, Add. 49 (Penn. C. P. 1793,) in which the eccentric man, afterwards Judge Brackenridge, was allowed to recover under the direction of the Court what the jury considered as a just compensation for his services as counsel. This case, however, was overruled after full consideration in *Mooney v. Lloyd*, 5 S. & R. (1819) 411, by the Supreme Court with the concurrence of all the Judges. In *Gray v. Brackenridge*, 2 Penn. (1830) 75, Judge Gibson changed sides and united with Judge Smith against Judge Rogers in overruling *Mooney v. Lloyd*. He afterwards justified his position on the ground that the profession of the law is no more than a *mere trade*: *Foster v. Jack*, 4 Watts (1835, 334.

In New Jersey according to the note to which I am indebted for the foregoing information, it is stated, "the high-toned ruling of the principal case, *Kennedy v. Broun*, obtains, and no suit can be brought by an advocate to recover compensation for his professional services:" *Seely v. Crane*, 3 Green 35: *Van Atta v. McKinney*, 1 Harrison 235.

It would, however, appear from the note that the majority of the States adopt the view now enunciated in Pennsylvania.

I am not, however, concerned about the law of the United States or of any foreign state on the subject under enquiry. I am only concerned about the law of our own



Province, and for that prior to 1792 resort is to be had "to the laws of England" as to "property and civil rights": 32 Geo. III. ch. 1 sec. 3.

It cannot be doubted that *Kennedy v. Broun*, 13 C. B. N. S. 677, although decided long after 1792, accurately expresses the law of England as it was in 1792 and long prior thereto.

The question now is whether we in this Province have by our legislation departed from the law which in England still prevails, and of which the best men in the profession in England, whether on the bench or at the bar, are so justly proud.

The Legislature of the former Province of Upper Canada in 1822 passed an Act empowering the Court of King's Bench by order or rule to ascertain, determine, declare, and adjudge all and singular the fees which shall or may be taken, or allowed to be taken by any clerk of the Crown, counsel, attorney, sheriff, officer, or other person, from or in respect of any business after the first day of Easter term to be done or transacted in the Court of King's Bench, as well in civil causes as in criminal prosecutions, &c. See 4 Geo. IV. ch. 1 sec. 8; Consol. Stat. U. C. ch. 22 sec. 332.

If it were not for some decided cases to which I shall presently refer, I should not have supposed that anything in this section contained could be held to confer upon barristers *the capacity* to make contracts in respect of their fees.

All that it does, or professes to do is, to enable the Court to regulate the fees which may be *taken* or *allowed* by the officers named. Some of these officers had a legal capacity to contract as to their fees. Some had not. Whether power to contract or not, no greater fees than those to be prescribed were to be *taken* or *allowed* to be taken by any of the officers named. Nothing more than this was, so far as I can judge from the language used, intended by the Legislature.

But in *Baldwin et al. v. Montgomery*, 1 U. C. R. 283, the Court, presided over by Sir John B. Robinson, having

prescribed a tariff of fees to be taken by the officers named, held that counsel might sustain actions for such fees as were established by the tariff, but that where the fees claimed were not such as to come under the tariff "the principle of law will apply which denies to counsel and physicians the right to sue for their professional services, a principle which it is thought in England for the advantage as well as for the honour of the profession should be maintained in force, and for reasons which apply equally here as well as in England," (p. 284).

In *Leslie v. Ball*, 22 U. C. R. 512, this Court consisting of the late Chief Justice McLean, the present Chief Justice of the Common Pleas, and my brother Wilson, held that an attorney who is also a barrister cannot shield himself from the clearly defined obligations of his retainer by alleging that in the matter complained of he acted as a barrister and not as an attorney.

In *Re C. K. & C.*, 6 P. R. 226, Vice Chancellor Blake held that there might be a reference to taxation of a bill exclusively for counsel fees, where the same gentlemen were both counsel and attorneys, the learned Vice Chancellor at the same time stating he was aware there was no precedent for the order which he made.

In *Re North Victoria Election Case*, 39 U. C. R. 147, this Court recently held that an adverse party could not be obliged to submit to the taxation of counsel fees, where on taxation he demanded evidence of payment, and there was no proof of payment.

In *Re Miller et al. v. McCarthy*, 27 C. P. 147, the Court of Common Pleas held that counsel in an election case could not sue the attorney for his counsel fees as money had and received to the plaintiff's use.

None of these cases cover the point in contest here. So far as they or any of them establish an exception to the general rule, it is clear that the present case does not come within any recognized exception. The services in respect of which the plaintiff sues, although performed by him as an advocate, were not performed in any of the Courts of

this Province, and are not provided for by any rule of any Court. An order made by either House of Parliament or by any committee thereof is in no sense the law of the land.

This case therefore, according to the language of Sir John B. Robinson in *Baldwin et al. v. Montgomery*, 1 U. C. R. 283, 284, falls within the principle which in England denies a counsel the right to sue for professional services.

It has in England from time immemorial been considered essential to the honour and dignity of the bar that there should be no traffic about counsel fees, no power to make contracts of hiring and service in reference to them. This has become a well understood and generally respected canon of English law. Under its operation there has existed in England for centuries as able, learned, and distinguished a bar as ever existed in any, or does exist in any part of the world. If the preservation of the canon be necessary in England it is, in my opinion, none the less necessary in this Province, where the professions of barrister and attorney are often united in the same person, and where the dignity and zeal of the barrister, if not carefully guarded, is in danger of being lost in the mere zeal of an attorney. The bar of this Province has not suffered from the limited operation of the English rule. Personally I deplore that there has ever been any encroachment on the integrity of the English rule. And if there is to be any further encroachment the work will not be mine or with my assent.

If the day should ever come when barristers, instead of being paid their fees when retained, may contract for future payment, and sue in the event of non-payment, and be sued for non-performance of contract as in the case of an ordinary contract for hiring and service, I do not think the public will gain anything, and I am sure the profession will lose by the change.

The public and the profession have in truth a common interest in maintaining the honor and dignity of the Bar. In a country like ours, where honor and dignity depend

more on personal conduct than on trappings of office, nothing should be done which would have a tendency in personal conduct to lessen the honour and dignity so essential to the maintenance of a high standard of professional rectitude at the bar.

As said by Erle, C. J., in *Kennedy v. Broun*, 13 C. B. N. S. 677, 738: "If the law allowed the advocate to make a contract of hiring and service, it may be that his mind would be lowered, and that his performance would be guided by the words of his contract rather than by principles of duty,—that words sold and delivered according to contract for the purpose of earning hire, would fail of creating sympathy and persuasion in proportion as they were suggestive of effrontery and selfishness, and that the standard of duty throughout the whole class of advocates would be degraded."

The same distinguished Judge in the same instructive judgment (p. 737) also uses these words: "The incapacity of the advocate in litigation to make a contract of hiring affects the integrity and dignity of advocates, and so is in close relation with the highest of human interests, viz. the administration of justice."

I confess I never read this inspiring judgment without, if possible, having increased veneration and increased love for the profession to which I owe so much.

It may be a weakness on my part, but it is a weakness in which I believe I shall glory as strength as long as I have any being.

In my opinion the rule should be made absolute.

*Rule discharged.*

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## TURNER V. DEWAN.

*Evidence—Entries against interest.*

In ejectment for a cottage, defendant claimed by length of possession, which she proved. The widow of one T., deceased, who had owned the property, stated that defendant's husband came to live in the cottage, which was on T.'s farm, as T.'s servant, paying no rent; that defendant, on her husband's death in 1866, remained in the house, and in 1870, agreed with T. to pay him \$1 a month rent, which she paid every three months until the Fall of 1873. T. died in January, 1873.

The following and similar entries in T.'s cash book, in his handwriting, relating to defendant:—"1871, February, Mrs. Dewan (def.) \$3; May, Mrs. Dewan, \$3; August 1st, Mrs. Dewan, \$3," &c.—

*Held*, admissible, as entries against interest; and that taking them in connection with Mrs. T.'s evidence, which they confirmed, the plaintiff was entitled to succeed.

EJECTMENT for certain premises in the township of York.

The defendant claimed title by length of possession in herself and those under whom she claimed.

The plaintiff claimed under a deed from one Crickmore.

The cause was tried before Moss, J., without a jury, at the Toronto Spring Assizes, 1877.

At the trial plaintiff proved a paper title, and defendant proved a title by possession. In reply, plaintiff tendered in evidence certain entries in a note book of his father, R. J. Turner, a former owner, of payments said to be of rent by defendant to R. J. Turner. The book was produced by Mrs. Turner, widow of Mr. R. J. Turner.

His Lordship was of opinion that if the entries were inadmissible the verdict should be for defendant, and being of opinion they were inadmissible, he entered a verdict for her.

The evidence is more fully referred to in the judgment.

During this Term, May 22, 1877, *M. C. Cameron*, Q. C., obtained a rule *nisi* to set aside the verdict and enter a verdict for the plaintiff, on the ground that the same was contrary to law and evidence; or for a new trial, on the ground of surprise by the evidence of the defendant and her daughter.

During the same term, May 31, 1877, *C. Robinson*, Q.C., shewed cause. There was no surprise, because Mrs. Dewan was examined before the trial, and gave the same evidence. The entries are not admissible, but if received they contain no statement that the payments were for rent.

*M. C. Cameron*, Q.C., contra. The plaintiff chiefly relies on the admissibility of the entries in Mr. Turner's book, and upon the construction put upon them, that they were for rent. The defendant's own evidence, and that of her daughter, were unsatisfactory in the extreme. He cited *Taylor v. Witham*, L. R. 3 Ch. D. 605.

June 30, 1877, MORRISON, J.—The principal question arising on this rule is, whether the entries in a cash book, of the deceased Mr. R. J. Turner, were admissible as evidence for the plaintiff—for if they were, the correctness of the plaintiff's contention, in my judgment, is fully made out. Mrs. Turner, his widow, stated in her evidence that the defendant's husband in 1861 or 1862 came to reside on the farm of the late Mr. Turner as their head man, and that he lived in the cottage in which the defendant now is, paying no rent for it: that in 1863, he, being in ill health, ceased to work for the Turners, but remained in the place until his death about 1866; that after his death his widow the defendant, remained in the cottage: that in 1870 Mr. Turner sent for defendant, and told her she would have to pay rent, that she pleaded poverty, and that he said he would only charge her a dollar a month, to which she assented, and from that period she paid that rent, her daughter every three months bringing the rent, except on one occasion when she brought six months' rent; and so in that manner the rent was paid until the fall of 1872, Mr. Turner dying in January, 1873.

After this testimony the entries in question were offered as evidence, and proved. All the entries appeared in a small cash book containing, receipts of cash during the years of 1871 and 1872, and were exclusively in the handwriting of the deceased Mr. Turner.

The entries relating to the defendant were as follows:— In 1871, "February, Mrs. Dewan \$3," "May, Mrs. Dewan \$3," "August 1st, Mrs. Dewan \$3," "November 2nd, Mrs. Dewan \$3": In 1872, "February 2nd, Mrs. Dewan \$3," "(after date) June 26th, l. Mrs. Dewan omitted \$3," "October 26th, Mrs. Dewan \$6."

Now it seems to me that these entries can only be read as cash received from defendant, and, as such, entries against interest, and, upon the authority of a late case, *Taylor v. Witham*, L. R. 3 Ch. D. 605, these entries, I think, were admissible.

The Master of the Rolls in that case held that entries, "July 8. Interest. Paid me, £20," "October 1. Interest. Paid me, £20," "December 27. Paid interest, £20," were admissible as being entries against interest. The learned Judge, after discussing whether these entries and others were against the deceased's interest, remarked that it might be urged that one of the other entries might be used to shew that the defendant owed a debt, said, p. 608: "If I at once admit the entry as being naturally and *primâ facie* against interest, I should say that the use which has been made of it is quite immaterial; that is according to all the authorities."

And, referring to the entries of July 8th, &c., I have mentioned, the Master of the Rolls said, p. 609: "As regards those three entries they are simply 'Interest paid,' and they do not shew payment from anybody standing alone. Why should a man enter in his book 'Interest paid me,' intending to make an entry for himself, and not against himself;" and further on in the judgment: "It appears to me when a man puts 'Interest paid me,' or 'Paid off, £20,' it is *primâ facie* a clear entry against interest which ought to be admitted, and I admit it on the general ground."

So here I think it very clear that the entries in question are *primâ facie* entries made by Mr. Turner against his interest, and so admissible, whatever value they may be. And, read alone, they would not of themselves perhaps help the plaintiff, yet, when taken into consideration with

the other testimony, they are of some value, for they shew the receipt of \$3 at regular intervals of three months, representing in amount the alleged rent which the defendant was to pay, and in that way they corroborate the testimony on the part of the plaintiff, particularly that of Mrs. Turner. If Mr. Turner in his lifetime had brought an action against the defendant for rent, and this book was produced on notice, these entries would have been evidence of payment of rent by the defendant.

As said by Hayes, J., in delivering the judgment of the Court, in *Regina v. Governors, &c., of Exeter, &c.*, L. R. 4 Q. B. 341, at page 345: "Having regard to the great changes that have, in recent times, been made in admitting the evidence of interested witnesses, when alive, it would be most objectionable to lay any narrow restrictions upon the reception of declarations in any way against interest which have been made by persons since deceased, and which are frequently the only evidence that can be obtained on the subjects to which they refer, and where the Courts are frequently obliged to supply the want of evidence by presumptions." I refer also to *Regina v. Overseers, &c., of Birmingham*, 1 B. & S. 763, where the subject is also discussed.

Irrespective of those entries, after reading the evidence carefully, I should say that it preponderates in favour of the plaintiff's contention, and that the plaintiff was entitled to succeed upon it alone. The answers of the defendant to the various questions, to my mind, are most unsatisfactory. As to the evidence of her daughter Ellen, upon which the learned Judge seems to place so much reliance, I cannot take so strong a view of it as against Mrs. Turner. When Mr. Turner, as alleged, borrowed the sums of \$2 and \$1, the witness could only be about six years old, and it is barely probable that without consultation with her mother or other person she could have remembered what she stated; besides her evidence did not exactly bear out the defendant's testimony. I noticed among the papers the examination of the defendant before the trial, and she



then appears to have stated that she sent the \$2 to Mr. Turner by her daughter Julia, not a year, as sworn at the trial, but about a month after her husband's death, and six weeks thereafter the \$1 by her daughter Ellen; and it is not unlikely, as she had been so examined, that she informed her family of such examination. On the whole, I am of opinion that the rule should be absolute to enter a verdict for the plaintiff; It is unnecessary to consider the affidavits filed on both sides.

HARRISON, C. J., and WILSON, J., concurred.

*Rule absolute.*

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ELLEY ET AL. V. PRATT.

*Insolvent Act of 1869—Charge of fraud under secs. 92, 93—Trial—Pleading.*

Where a defendant was sued for a debt, and, under secs. 92, 93 of the Insolvent Act of 1869, was charged in the declaration with fraud committed in incurring such debt: *Held*, that such fraud might be proved in the action and defendant declared guilty, whether the case was tried by a common jury or by a Judge without a jury.

*Regina v. Kerr*, 26 C. P. 214, distinguished, as having been an indictment for an offence under section 147.

The defendant in such a case may plead or demur to that part of the declaration which charges the fraud. *Rutherford v. Eakins*, 27 C. P. 55, commented upon.

DECLARATION, on the common counts.

Second count. The plaintiff averred that in the month of August, 1875, he sold on credit to the defendant the goods mentioned in the common counts, amounting to \$463.30, and the plaintiff gave time or credit for payment of same; and at the time defendant purchased the said goods, and obtained credit, the defendant well knew that he was unable to meet his engagements, and concealed the fact of such inability from the plaintiff, with the

intent to defraud the plaintiff; and the defendant has not paid the debt or any part thereof, although the time for payment has elapsed. And the plaintiff charged that the defendant, by reason of the premises, was guilty of fraud, within the meaning of the Insolvent Act of 1875. And the plaintiff claimed in the action \$500, and at the trial thereof would seek to establish the fraud so charged.

Pleas:—Never indebted; and to the last count of the declaration, not guilty.

Issue,

The cause was tried before Harrison, C. J., at Ottawa at the last Assizes.

The plaintiff, at the trial, proved his debt under the common counts, and a verdict was entered for \$463.30. At the trial after proof of the incurring of the debt, defendant's counsel objected that the debt being incurred prior to the Insolvent Act of 1875, the fraud could only be tried before a special jury, under the Act of 1869, citing *Regina v. Kerr et al.*, 26 C. P. 214; and as the plaintiff's counsel was then unable to distinguish that case from the present one, the learned Chief Justice gave effect to the objection, and no evidence of fraud was given in deference to the ruling.

During this Term, May 25, 1877, *J. K. Kerr*, Q. C., obtained a rule *nisi* to set aside the verdict, and for a new trial, on the ground that the question should have been submitted to the jury to declare whether the defendant was or was not guilty of the fraud with which he was charged in the pleadings, and that such question should not have been withdrawn from the jury by the learned Chief Justice who presided at the trial; and for such amendments on the record or in the pleadings as would enable the question to be submitted to the jury, to declare whether the defendant was not guilty of fraud in the transaction disclosed in the evidence at the said trial; or for such other rule or order as might appear to be necessary or proper for sumitting the question to the jury.

During the same term, June 4, 1877, *M. C. Cameron*, Q. C., shewed cause. The defendant cannot be successfully charged with fraud under the Act of 1875, when that Act did not come into force until after the debt in respect of which the charge is made was incurred. The case of *Regina v. Kerr et al.*, 26 C. P. 214, cited at the trial, is conclusive.

*J. K. Kerr*, Q. C., supported the rule. The case last cited is inapplicable here. That was a case of indictment under sec. 147 of the Act of 1869; this is rather under sec. 92. Ho cited *Rutherford v. Eakins*, 27 C. P. 55; *Clarke's Insolvency*, 354; *Jones v. Bejeau*, 1 Pugs. N. B. 354; *Steven's Digest*, N. B. 228.

June 30, 1877. MORRISON, J.—It was contended at the trial, as well as on the argument of this rule, that the alleged fraud was one committed before and punishable under the Insolvent Act of 1869, 32-33 Vic., ch. 16, secs. 92 and 93, and that the charge of fraud could only be enquired into and tried by a special jury under the provisions of the 148th section.

After considering the effect of these different sections, I am of opinion that in cases under secs. 92 and 93, where a debtor is sued for a debt and in the declaration the defendant is charged with having committed a fraud when he incurred the debt sued for within the 92nd section, that such fraud may be proved in such action and the defendant declared guilty whether the case be tried by a common jury or by a Judge.

That such was the intention of the Legislature is quite evident from the language of secs. 92 and 93. It was however argued that sec. 148, which enacts, "that all offences punishable under this Act shall be tried as other offences of the same degree are triable in the Province where such offence is committed, save that the jury empanelled to try the same shall be a special jury, to obtain which the prosecuting officer is required and authorized to take such proceedings as in a civil case are necessary to obtain such a

jury;" is applicable to the trial of the question of fraud mentioned in sec. 92, and that a special jury ought to have been been struck to try the question. I cannot take that view of it.

The case of *Regina v. Kerr et al.*, 26 C. P. 214, to which we were referred, was the case of an indictment for an offence within sec. 147, which stands upon a very different footing from this case. With the exception of the fraud mentioned in sec. 92, the only offences I can find punishable under the Insolvent Act are those mentioned in the two preceding sections to section 148, secs. 146 and 147, under the title "Offences and Penalties."

The 146th section declares that assignees and guardians shall be agents within the meaning of the 76th and following sections of the Act respecting larceny and other similar offences; and the 147th section declares certain specified acts of insolvents to be misdemeanors; and the 148th section provides, as before stated, that offences shall be tried by a special jury.

Now it seems to me that that section was only meant and can only apply to cases triable by indictment in the usual way, with this exception, that the jury empanelled shall be a special jury. The reference to the prosecuting officer in the section, &c., indicate such to have been the intention.

The Legislature had previously provided by secs. 92 and 93 that the incurring of a debt under specified circumstances should be a fraud, and that the debtor committing such fraud should be subject to punishment, *provided* that in the suit against him for the recovery of the debt the defendant was charged with such fraud in such action and declared guilty of the fraud, whether the trial of such suit was before a Judge without or with a jury, and if not before a jury it provides when the Judge shall adjudge the term of imprisonment. And I may here notice that the punishment is also contingent upon the non-payment of the debt and costs recovered in such action.

It seems to me that the statute having provided that the



question of fraud mentioned in the 92nd section might be proved, if charged in the declaration, in the suit for the recovery of the debt, whether before a jury or by a Judge without a jury, that it was not intended that such fraud when so charged should be included or be within the provisions of section 148, as only triable by a special jury.

The object the Legislature had in view was, that if fraud was committed when the debt was incurred, and proved against him, that if the debtor failed to pay the debt and costs recovered against him, to punish him for such a fraud, without resorting to proceedings by indictment.

I therefore think that the rule should be absolute to set aside the verdict, and for a new trial.

HARRISON, C. J.—When this case was before me at Nisi Prius, it was objected by counsel for the defence that, as the fraud alleged was committed, if at all, by the defendant before the repeal of the Insolvent Act of 1869, that it was only triable by a special jury, and *Regina v. Kerr et al.*, 26 C. P. 214, was cited to me in support of the objection.

Having at the time some general recollection of the case cited I asked the counsel for the plaintiff if he was able to distinguish it, and he said he could not.

Not having the statute or the case in my hand, I gave effect to the objection, and refused to try the charge of fraud with a common jury, and, excluding this, issue tried the ordinary issues only, and there was a verdict for the plaintiff as to them.

I am now, after argument, convinced that there is a distinction, such as suggested by my brother Morrison, and that *Regina v. Kerr et al.* is inapplicable.

While it is in one sense an offence for a person knowing or believing himself to be unable to meet his engagements, and concealing the fact, to purchase goods on credit with intent to defraud the vendor, or by false pretences to obtain a term of credit for the payment of any advance or loan of money, or of the price or any part of

the price of any goods, wares, or merchandize, with intent to defraud, it is an offence only against the creditor and not against the public, and so not a "misdemeanor" under section 148 of the Act. See section 140 of the present Act.

The offences to which sec. 148 particularly refers are those described in sub-secs. 1, 2, 3, 4, 5, 6, 7, and 8, of sec. 147, all of which are under the heading "Offences and Penalties," and all of which are offences against the public.

A person convicted of one of these enumerated offences is not only declared to be guilty of a misdemeanor, but absolutely liable, in the discretion of the Court before whom he is convicted, "to punishment by imprisonment for not more than three years, or to any greater punishment attached to the offence by any existing statute;" whereas a person charged under sec. 92 cannot be convicted if after the offence he have paid the debt and costs, and when convicted is only liable to imprisonment "for such time as the Court may order, not exceeding two years, *unless the debt or*" (and?) "*costs be sooner paid.*" See *Rogers v. Sancer*, 18 L. C. J. 57; *Warner v. Buss*, *Ib.* 184, and sec. 136 of the present Act.

So that while persons convicted under sec. 148 are absolutely liable to punishment as for crime against the public, persons convicted under sec. 92 are only conditionally punished, the object of the so called punishment being if possible the enforcement of the payment of the debt and costs.

In the latter case the coercive proceeding is in aid of or incident to the civil remedy for the collection of a debt, and not at all for the punishment of a criminal.

We are not prepared to assent to the proposition, for which the decision of Mr. Justice Galt, in *Rutherford v. Eakins*, 27 C. P. 55, was cited, viz., that the debtor can neither plead nor demur to so much of the declaration as charges the fraud.

Where a person under particular circumstances may in a suit or proceeding for the recovery of a debt be charged with fraud, be adjudged guilty of the fraud charged, and

be imprisoned for the fraud charged, it appears to us that if the declaration do not disclose such a case as the statute intends, the defendant should have the opportunity of saying so at once, and perhaps avoiding the expense of a useless trial.

Whatever doubt may exist as to the right to demur or plead to a claim for an injunction appended to an ordinary declaration for a wrong, which injunction may be asked for and usually is asked for after the trial—See *Bilke et al. v. The London, Chatham, and Dover R. W. Co.*, 3 H. & C. 95—the adjudication as to fraud under sec. 92 and 93 of the Insolvent Act of 1869 can only take place at the trial, and be an essential part of the trial: *Jones v. Bejeau*, 1 Pugs. N. B. 334.

The difference between the two cases is, that while the adjudication as to an injunction may be by the Court or Judge after the trial, the finding as to fraud under secs. 92 and 93 of the Insolvent Act of 1869, can only be at the trial and by the jury who try the other issues on the record.

If there be the allegation in the declaration of the matters of fact sufficient, if true, to render the defendant subject to the *quasi* criminal consequences of the act, the statute itself in effect provides for the plea and issue by declaring that “whether the defendant in any such case appear and plead or make default the plaintiff *shall be bound to prove the fraud charged.*” But if “*the fraud charged*” is not such a fraud as the Act intends, proof of the fraud charged in the declaration would be idle and useless for the purposes of the statute.

In such a case we see no objection to the defendant saying, “So much of your declaration as charges me with fraud is bad in substance, and I leave it to the Court to decide whether there shall be any trial in respect thereof,” in other words, that “portion of the declaration is bad in substance.”

The declaration, under the statute, combines not only the ordinary cause of action in respect of a debt, but a *quasi*

indictment, charging fraud of a particular kind in and about the contracting of the debt; and in this respect the declaration is divisible.

It is true that the issue as to the fraud does not go to the cause of action, and so is collateral, but it is an issue on which the liberty of the defendant is made to depend, and that may be of more consequence to an insolvent than the mere recovery of a judgment for money demand.

The defendant in this case has, therefore, as it appears to us, not improperly pleaded not guilty to the charge of fraud, and the jury at the next trial must be sworn to try all the issues, including the issue on the charge of fraud, and a true verdict give according to the evidence.

I concur in making the rule absolute for a new trial, without costs.

WILSON, J., concurred.

*Rule absolute.*

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## IN RE ATTORNEYS.

### *Costs—Taxation of.*

The applicant M. having a claim against one P., placed it in the hands of attorneys, to prosecute the action as she said, but to effect a settlement with P., as they alleged, and forbidding them to sue. P. agreed to pay \$300 in full, including all costs. The attorneys alleged that \$250 only of this was to go to M. according to her agreement with P., and the remaining \$50 to them for the costs; while M. denied this, asserting that she was entitled to the \$300, subject to their claim for costs to be taxed: *Held*, there being a doubt as to the facts, that the general rule should prevail, that the attorney must account for all the money received and the client pay his costs.

During Hilary Term, February 16, 1877, *Donovan*, for one Margaret M., obtained a rule calling on the above named parties to shew cause why the order of Morrison, J., made in this matter in Chambers, of the 23rd of January, 1877, should not be rescinded; and why the orders of the clerk of the Crown and Pleas of this Court made in this matter in Chambers, dated respectively the



11th of September and the 18th of December, 1876, should not be respectively confirmed; and why the said parties above named should not pay the costs of this motion and of the proceedings before Mr. Justice Morrison.

The order of the 11th of September directed the delivery of a bill of costs by the attorneys, and directed "that the costs thereof abide the result of the taxation of said costs." The order of the 18th of December discharged a summons to rescind the former order with costs, and confirmed that former order. The order of Mr. Justice Morrison, dated the 23rd day of January, 1877, reversed the two orders made by the clerk of the Crown and Pleas, but gave no costs of the appeal.

The facts, which were detailed at great length in the affidavits and proceedings filed, may be shortly stated as follows: The applicant, M., had a claim upon one P. She went to the attorneys above named, as she said, to prosecute the action for her as her attorneys, and she retained them. The attorneys denied that. They said she went to them to get them to effect a settlement between her and P., and that she forbid them from suing out a writ against P.—P. agreed with the attorneys to pay \$300 in full of all claims, costs and all, against him, and it was finally accepted. He did pay \$100 in cash, and he gave her four promissory notes for \$50 each in settlement, and an agreement was executed between the parties to that effect. The attorneys had paid the applicant \$50 in cash, and they had handed to her, since these proceedings in Chambers began, the four promissory notes. They retained \$50 for their costs. The applicant said that money was hers, subject to the right of the attorneys to be paid the taxed amount of their bill for their services. The attorneys said she has no claim to the \$50 or to any part of it, and that they never had and have no bill against the applicant for costs: that the agreement come to between the applicant and P. was, that P. was to pay \$300 in full, \$250 of which was alone to be for the applicant, and the remaining \$50 for the attorneys.

It was upon that point they differed. The attorneys declare that the applicant "agreed to accept \$250 in full of all claims for her alleged cause of action, stipulating that P. should pay all charges had in the matter, to all of which P. agreed."

During Easter Term, May 29, 1877. *Osler* shewed cause, and referred to *Re Lemon et al.*, 1 C. L. J. N. S. 19; *Re Francis*, 6 C. L. J. 20; *Bank of London v. Tyrrell*, 27 Beav. 273.

*Donovan*, contra, cited *Re Gregg*, L. R. 9 Eq. 137; *Re Street*, L. R. 10 Eq. 165; *Morgan & Davey* on Costs, 322; *Re Blackmore*, 13 Beav. 154; *Jarvis v. Great Western R. W. Co.*, 8 C. P. 280; *Re Prince*, 3 Chy. Chamb. 282.

June 30, 1877. WILSON, J. Many authorities were cited on each side, but I do not consider it necessary to examine them, because the question in dispute is, whether the \$50 retained by the attorneys was the money of their client at any time, or whether it was the money of P., and at no time the money of Margaret. If that sum was hers, then there may be a taxation. If it was not hers, there can be no taxation.

[After stating the effect of the affidavits, his Lordship continued:]

There is, to say the least, a doubt how the matter actually is. In such a case it is better to conform to the general rule that the attorney shall account to the client for all the money which he receives in the course of his professional management of the cause, and that the client shall pay his costs. It is somewhat irregular for the attorney to look to the opposing party, or to bargain with him for his costs, for in some cases it may operate actually to the disadvantage of the client, and perhaps it has always a tendency to do so. The more liberal the opposite party is in his allowance of costs, the more, in the natural course of things, is there some interest taken in him by the attorney, as well as in his client, and the moment their interests conflict there is, to say the least, the danger of a

wrong being done in fact, and that is a wrong in effect done already. I do not say anything against or impute anything whatever to the professional men in this case. All I say is, that upon a consideration of all the facts of the case brought before us I am of opinion their claim for compensation in the matter between the applicant and P., is one to be settled between them and their client, the present applicant, and is still open to be reviewed upon taxation. The fact that the client was a young woman poor and in great difficulty, and without any one to depend upon for advice and protection in the matter in which she retained the attorneys, must also be considered.

I think the order of Mr. Justice Morrison should be rescinded, and that the orders before mentioned of the 11th of September and of the 18th of December, 1876, should be amended by striking out the words "and that the costs thereof (the delivery of the bill of costs, and of the application for such delivery) abide the result of the taxation of said costs," contained in the order of the 11th of September, and confirmed by the order of the 18th of December; and that the residue of the said orders should stand and be confirmed; and that the applicant receive the costs of the order of 18th of December; and that the rule be made absolute, without costs.

HARRISON, C. J., and MORRISON, J., concurred.

*Rule absolute.*

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THE POSTMASTER GENERAL V. ROBERTSON ET AL.

*Public officer—Assignment of chose in action to.*

A declaration on the common money counts, by the Postmaster-General, alleged that defendants were indebted to one M., who assigned such debt or chose in action to the plaintiff: *Held*, sufficient, under 38 Vic. ch. 7, D., without alleging that the debt was connected with plaintiff's office, that being a matter of evidence at the trial.

APPEAL from a decision of Galt, J., who verbally gave judgment for the plaintiff on demurrer.

The second count of the declaration set out that the defendants were indebted to one Mortimer for money payable by the defendants to Mortimer, &c.—following the usual money counts and account stated—and that Mortimer on the 17th of August, 1875, assigned such debt or chose in action to the plaintiff by an instrument in writing under seal, and that the debts is still due and unpaid.

Demurrer, assigning as causes, that the plaintiff sues only as a public officer in his capacity of Postmaster General, and that the count does not state or shew that the alleged debt or chose in action assigned was in any way connected with the public interests of the plaintiff's office, and that the Postmaster General as such public officer has no right or power to traffic with private choses in action or to sue for the same as such public officer.

During this term, May 28, 1877, the case was argued by *Beaty*, Q. C., for defendants. The declaration does not shew that the Postmaster General is suing for a public or post-office debt. He cited *Rex v. Croker*, 1 Cowp. 26. *Grant on Corporations*, 635; *Angel & Ames on Corporations*, ed. 1875. *Wood v. McAlpine*, 1 App. R. 234.

*Bethune*, Q. C., contra. The Postmaster General could formerly have filed an information in equity, and now by the Administration of Justice Act, 1873, sec. 2, he can proceed here. That he sues for a public debt is a matter for proof at the trial, and not necessary to appear on the pleadings.

June 30, 1877. MORRISON, J.—The 85th sec. of 38 Vic. ch. 7, D., enacts "that all suits, proceedings, contracts, and official acts to be brought, had, entered into, or done by the Postmaster General, shall be so in and by his name of office, and may be continued, enforced and completed by his successor in office as fully and effectually as by himself."

And by sub-sec. 2 of the same section "all suits to be commenced for the recovery of debts or balances due to the post office, whether they appear by bond or obligation made in the name of the existing or any preceding Postmaster



General, or otherwise, shall be instituted in the name of The Postmaster General."

And by sub-sec. 3 of sec. 10, he shall "enter into and enforce all contracts relating to the conveyance of the mails, or other business of the Post Office.

And by sec. 12 "any bond or security required or authorized by any regulation or by any order of the Postmaster General in any matter relative to the Post Office, shall be valid in law, and may be enforced according to its tenor on breach of the condition thereof."

I see no ground or reason for holding, as contended by the defendants, that the Postmaster General in his official capacity may not take an assignment of a chose in action for the benefit of the Crown whom he represents in the exercise of his duties and functions of his office; or such an assignment which is in any way connected with or arising out of the business of his office; or in the case of his taking such an assignment that the beneficial interest in any such chose in action so assigned would not be vested in the Postmaster General, within the meaning and intent of the statute of Ontario making choses in action assignable: 35 Vic. ch. 12; or that the Postmaster General would not be entitled to sue for the recovery thereof in his official capacity as Postmaster General. I therefore see no defect in this count, as the plaintiff would have to shew at the trial, if his right was disputed, that the chose in action in question was assigned to him as Postmaster General in his official capacity, and not to him as a private individual.

I have looked at the case in appeal of *Wood v. McAlpine*, 1 App. 234, to which Mr. Beaty referred us. I find nothing in the the judgment of the learned Judges at variance with the decision we have arrived at.

We think the judgment of Mr. Justice Galt was correct, and that the judgment must be affirmed, with costs.

HARRISON, C. J., and WILSON, J., concurred.

*Judgment affirmed.*

## PEARSON V. THE CORPORATION OF THE COUNTY OF YORK.

*Highway—Neglect to repair—Limitation of action—36 V. c. 48, s. 409, O.*

Defendants made a hole in the highway in order to ascertain whether repairs were required there, but they did not replace the materials or fill up the hole, nor place a light there; and the plaintiff, crossing the road, fell against the materials so left, and into the hole. *Held*, a cause of action within sec. 409 of the Municipal Act of 1873, and that the plaintiff suing after three months was barred.

ACTION for negligence in the repair of a road. The pleas were not guilty, and a special plea setting out that the hole was made by defendants' workmen to ascertain the quantity of metal on it, with the view of repair, as they lawfully might, &c., and the hole was properly filled up, and the highway repaired and rendered fit for travel, and so remained a long time, and afterwards became out of repair without defendants' notice or knowledge, &c.

The cause was heard before Wilson, J., at the Winter Assizes in Toronto, without a jury, when the learned Judge found a verdict for the defendants.

It appeared from the evidence that the hole or opening in the highway in question was made by the defendants' workmen for the purpose of ascertaining whether the road at that part of it required repairing, a work or duty which they were lawfully entitled to perform: that the workmen had not replaced the materials or repaired the opening so made; and there being no light or means taken to warn persons using the road, the plaintiff while crossing the road the same evening struck his foot against some of the materials taken out of the road-bed, and fell on his knee into the hole.

During Hilary Term, February 16, 1877, *Delamere* obtained a rule *nisi* to set aside the verdict and enter a verdict for the plaintiff for \$200, pursuant to leave reserved, on the ground that the limitation in sec. 409 of the Municipal Act of 1873, 36 Vic. ch. 48, O., as to three months, applied only to cases of omission or non-repair, and did not apply to the circumstances of this case.

During this term, June 1, 1877, *J. K. Kerr*, Q. C., shewed cause. The charge here is of negligence on the part of the county, not that the accident occurred from an act done by the county. The limitation of three months therefore applies, and is a bar to the action.

*Delamere*, contra. Negotiations were pending here for three months. The statute, if applicable, does not interfere with the common law liability of defendants. The case is identical with *Rowe v. Corporation of Leeds and Grenville*, 13 C. P. 515.

June 30, 1877. MORRISON, J.—The only question we have here to determine is, whether the limitation of three months mentioned in sec. 409 of the Municipal Act applies to this case, for if it does the plaintiff's rule must be discharged. This is not like the case of *Rowe v. Corporation of Leeds and Grenville*, 13 C. P. 513, upon which the plaintiff relies. That was a decision arising out of the pleadings—by which it appeared that the act complained of was the leaving on the highway certain earth which had been placed there by the defendants, and the defendants merely pleaded that the action was not brought within three months, and the plea was held bad on demurrer, as the action was not based on the neglect of the defendants to keep their road in repair. Here the plea sets out the circumstances under which the hole was made, &c., and the evidence at the trial shews that the object for which the opening in the highway was made was, as stated, with a view to reparations of the road, the gravel or earth on the road having been thrown out in digging, and so far part of the work the defendants' men were doing.

The learned Judge found that the hole was not filled in again or the road repaired. The question arises whether the highway, at the time of the accident to the plaintiff, was out of repair. This subject is discussed at length by the learned Chief Justice of this Court in *Castor v. Corporation of the Township of Uxbridge*, 39 U. C. R. 113, and also in *Toms v. Corporation of Whitby*, 37 U. C. R.

100 in Appeal, affirming the judgment of this Court, 35 U. C. R. 195. I take it from the principles laid down, and the grounds upon which the decisions in these cases rested, that the road now in question being in a defective state was out of repair, and that the defendants were consequently liable, under sec. 409 of the Municipal Act, for the injury resulting to the plaintiffs for their default in not repairing the road-bed, and their negligence in not placing a light or other signal to warn persons using the road of the defect in question.

That being the case, the question remains, whether the plaintiff can recover, as he did not bring this action within three months. The same sec. 409, which gives the right of action, enacts that the action must be brought within three months, which the plaintiff has not done. The rule must therefore be discharged.

This is a hard case on the part of the plaintiff, and it is to be regretted that the county did not find it to be their duty to make some compensation to the plaintiff, who so unfortunately suffered from their neglect.

HARRISON, C. J., and WILSON, J., concurred.

*Rule discharged.*

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IN RE BROOKS AND THE CORPORATION OF THE COUNTY OF  
HALDIMAND.*County Council—36 Vic. c. 48 s. 413—Obligation to build bridge—  
Mandamus.*

By the Municipal Act of 1873, sec. 413, as amended by 37 Vic ch. 16, sec. 19, "it shall be the duty of County Councils to erect and maintain bridges over rivers forming or crossing boundary lines between two municipalities within the county." The Grand river runs between the townships of Oneida and Seneca. A bridge had been erected over it at the village of York, between the villages of Caledonia and Cayuga, about eighteen years before, by a joint stock company, and having been abandoned by the company had become unfit for travel, leaving a distance of twelve miles, from Caledonia to Cayuga, without any bridge. *Held*, HARRISON, C. J., dissenting, that under these circumstances, and upon the affidavits, which are fully stated below, a mandamus should go directing them to build a bridge at or near the village of York.

DURING Michaelmas term, November 23, 1876, *Robinson*, Q. C., obtained a rule calling on the County of Haldimand to shew cause why a peremptory writ of mandamus should not issue, commanding them to erect and maintain a bridge on the Grand River, at or near the village of York, where the said river forms the boundary line between the townships of Seneca and Oneida in the said county, and why the county should not pay the costs of this application.

The affidavits filed by the applicant stated :

That the Grand River forms the township boundary line for about thirteen miles between the townships of Seneca and Oneida, within the county of Haldimand : that the first bridge known to have been erected across the Grand river at York was about eighteen years ago, which was built by a joint stock company, and was destroyed by a windstorm about four years afterwards : that the next bridge built there was about fourteen years ago ; —it also was built by a joint stock company, and it is still there : that the last mentioned bridge was thrown open for public travel free of toll more than two years, as the joint stock company which owned it abandoned it : that the said bridge has become very unsafe and exceedingly dangerous to travellers, so much so that it is very little used, although a bridge

there is very much needed : that there is no bridge across the Grand river between the villages of Caledonia and Cayuga, except the bridge before mentioned at York, and the railway bridges, which latter bridges can only be used by the railway cars : that there is a public road or highway leading from and through the township of Oneida to the village of York, which is situated on the Seneca side of the river ; and also a public highway leading to that village through the township of Seneca, the said bridge at York forming the connecting link between these roads for many years : that for many years before the building of the first mentioned bridge at York, there was a ferry boat in use over the river at that place : that York has a population of about three hundred inhabitants ; it has also a grist mill, a saw mill, a plaster mill, several merchant's shops, a drill shed, show grounds, churches, and a burying ground : that the townships of Seneca and Oneida have each a population of about three thousand, and together pay about one-third of the taxes of the whole county : that the want of a bridge at York over the Grand river is a serious inconvenience and loss to a large number of rate-payers of the townships of Seneca, Oneida, North Cayuga, Rainham, and Walpole : that York is on the Seneca side of the river, about half way between the villages of Caledonia and Cayuga, and the village of Indiana is about half way between York and Cayuga : that a good, safe and suitable bridge for travel could be erected over the Grand river at York for about \$10,000, which amount is much in excess of the cost of the present bridge, which has been in existence for many years : that the banks of the Grand river at York are not of such a nature as to make the erection of a bridge there either difficult or expensive, and the width of the river there is about two hundred yards : that in the spring of the year, and frequently in the fall, the public road from Caledonia to York on the Seneca side of the river is overflowed by the freshets, and is impassable, at which times the mail carrier between these places is obliged to cross the York bridge after coming from Cayuga

through Indiana, at which place there is a post office: that the county is perfectly able to erect a suitable bridge over the river at York, with scarcely a perceptible increase in the taxation of the ratepayers of the county, there being no debt against the county of any magnitude, and few counties of the Province are in a better financial condition than Haldimand: that the joint stock company which built the present bridge still existing at York has by by-law abandoned the bridge, and given notice of such fact to the county council: that a wooden bridge over the river at York would cost \$10,000, but an iron bridge much more: that the bridge would cost from \$10,000 to \$20,000, according to the nature of the construction: that a notice was given to the Warden of the county requesting the county council to put up a bridge at York across the Grand river: that on one occasion the county council, upon a resolution which was duly moved and seconded in that body that the county should build such bridge, voted it down on a vote of nine to five: that the matter has been frequently before the county council, but the motion to build a bridge has always been voted down: that in June last the motion was again brought before the council, when it was again voted down by eleven to six; and that the assessed value of the property of the county is more than seven millions of dollars, and a large portion, if not all, of the real estate of the county is assessed under its real value.

There were fourteen affidavits filed on the motion.

Five of them were made by inhabitants of the township of Seneca. Two by inhabitants of the township of Oneida. Four by those who belong to the town of Cayuga. One by the reeve of the town of Caledonia. One by a resident of the township of North Cayuga, and one by a resident of the village of York, he being also the reeve of the township of Seneca.

There were sixteen affidavits filed in answer to the rule. Three from the village of Dunnville. Two from the township of Oneida. Three from the township of Seneca. Three from the township of Walpole. Two from the

township of Rainham; and three from the township of North Cayuga.

*Mr. Stevenson*, the clerk of the county council, in his affidavit stated that the debt of the county was for principal \$105,000, and for interest \$61,440; that the amount paid by the county for the bridge built across the river at the town of Cayuga was upwards of \$27,500, and the sum paid and to be paid for interest on the said amount is \$12,840: that the rent received by the county for the said bridge for the present year is \$730: that the amount paid by the county for the erection of the bridge across the river at the village of Caledonia was \$26,000, and the sum paid and to be paid for interest on the said amount is \$27,600, and the rent received for the bridge for the present year is \$1100.

*Matthew Gill*, who was reeve of the township of Oneida, said, that with the exception of a small number of the inhabitants of Oneida who reside along or near the Grand River, the ratepayers have all the accommodation they want in the way of grist mills, saw mills, merchant shops, burying grounds, and post offices, without having recourse to those in the village of York, in the township of Seneca, on the opposite side of the river: that there is not any main or leading highway leading through the township of Oneida to the river opposite the village of York, there being only the ordinary concession roads and side lines of the townships, by which alone all persons except those who reside along or near the river must reach it: that if a bridge were erected across the river at York it would not be in line of or connect any township boundary line road on either side of the river nor in line of, or form a connecting link between any main or leading highway through the townships of Oneida and Seneca to or from any place within or without the county: that the travel upon such a bridge would be principally that of the inhabitants and ratepayers of Oneida, who reside upon or near the river in the vicinity of the villages of York and Indiana, which are about three miles apart: that the cost of a bridge there



either of wood or iron would not be less than from \$15,000 to \$20,000, and the cost of maintaining it would be a serious charge on the county: that erecting and maintaining a bridge across the river at York at the expense of the county would not be in the interest or for the benefit of the county at large, but would be simply and mainly for advantage of the business people of the village of York and the inhabitants of Oneida who reside in the neighbourhood of the village: that Thomas Martindale, Nathaniel H. Wickett, and Adam A. Davis, who have made affidavits in support of the application, reside in the village of York and carry on business there, and the bridge in question would be an advantage to them, and the bridge would also be a convenience to A. W. Thompson, who lives a short distance below the village of York: that the Grand River flowing through the county forms the boundary line between the township of North Cayuga and South Cayuga, between Canboro and Dunn, between Dunn and Moulton, and between Moulton and Sherbrooke, and in no place is the river between these townships less than a quarter of a mile in width, and in many places it exceeds half a mile, and there are marshes of great extent and depth, so that if bridges across the river were built between these different townships they could only be built at an immense expense to the county: that the inhabitants of Rainham are well supplied with all places of business, and that the inhabitants deal there or at the villages of Dunnville, Cayuga, Jarvis, or Hagarville: that there is no leading highway from Rainham to York, the line of travel between these places is by the ordinary concession and side lines: that before the completion of the Hamilton and Port Dover line of railway the principal market of the ratepayers of the township of Walpole was the city of Hamilton, and that the line of travel was through the village of Caledonia, and since the completion of that railway the people of Walpole do their business chiefly in the villages of Jarvis and Hagarville: that a bridge across the river at York would be of no benefit to the inhabitants of Walpole, except perhaps to a

few who reside in the extreme eastern part of the township adjoining to Rainham, and even to them it would be of no great advantage, as the bridge at Cayuga is quite as convenient to them and for them: that Walpole is by far the largest and most populous township in the county, and the ratepayers of it are heavily taxed for the bonus of \$65,000 and interest granted by them and by the ratepayers of Seneca, Oneida, and the village of Caledonia, to the Hamilton and Lake Erie Railway Company, and they are further heavily taxed for county, township and school purposes: that the amount levied for county purposes in the township of Walpole is more than one-half greater than the sum levied for the same purpose in any other municipality in the county, and that to almost all the inhabitants of North Cayuga the want of a bridge across the river at York is not of the slightest consequence or inconvenience.

Then there were three affidavits filed on behalf of the applicant in reply, stating: that the debt of the county is not as represented by Mr. Stevenson, the county clerk, \$105,000 with \$61,440 for interest: that the debt is the \$65,000 granted as aforesaid for railway bonus, the amount of which is levied on the particular municipalities which voted for it: that some part of the debts contracted for building the Caledonia and Cayuga bridges, and the registry offices, is still due, and that there is no arrear for interest whatever: that the road leading through the centre of Seneca to York has been a leading road for the last twenty-five years, and a great number of side lines lead to it, the bridge now dilapidated having been in use for eighteen years, and that the main road on the Oneida side of the bridge enters the said township about its centre, and there is no other road in these townships so much travelled as it is excepting the Hamilton and Port Dover road: that a good wooden bridge could be erected at York for a sum not exceeding \$8,000, as the last bridge was built at a cost of about \$4,000, and stood and remained fit for travel for fourteen years: that the debt of the county besides the railway bonus is \$50,000.

During this term, May 26, 1877, *Osler*, shewed cause. The affidavits filed by the applicant do not shew a case for the interposition of the county in directing so large an outlay to be made by the county for the use or convenience of a comparatively small number of the inhabitants or ratepayers. No doubt the bridge which is asked for would be some advantage, but not by any means so great an advantage as would justify this Court in controlling the exercise of the discretion of the County Council, which has heretofore refused to entertain the repeated applications which have been made to it for the purpose. That body is of opinion that a bridge is not required at the village of York excepting by a few persons who reside in and about that neighbourhood, and they think that the convenience of a few should not be allowed to override the requirements of the other parts of the county, and the wishes of the others who will be bound to pay for this work although it can be of no use to them. The county council should, upon such a case as the applicant has made, and upon the affidavits which so fully answer it, have the matter left in their own hands. It is only in an extreme case the Court should interfere with such a body: *Municipal Act, 1873, secs. 412, 413; Re Board of Education and Corporation of Perth*, 39 U. C. R. 34, 53; *High on Extraordinary Legal Remedies*, sec. 419 p. 297; *Kinnear and the Corporation of the County of Haldimand*, 30 U. C. R. 398. The proper remedy is by indictment, not by mandamus: *Re Jamieson and the County of Lanark*, 38 U. C. R. 647; *Regina v. Brown*, 13 C. P. 356; *Re Stratford & Huron R. W. Co. and the County of Perth*, 38 U. C. R. 112, 157.

*Robinson*, Q. C., with him *Bell*, supported the rule. The case of *Re Jamieson and the County of Lanark*, 38 U. C. R. 647, cannot apply here, for it has been decided in *Regina v. The Corporation of the County of Haldimand*, 38 U. C. R. 396, that an indictment will not lie in this case, and with respect to this very bridge, because there is no highway or established public bridge which the county has

anything to do with. The application is not to repair a highway, but to lay out and establish one. In the case referred to, which was one of non-repair, an indictment was the proper remedy. In this case, which is for a wholly different purpose, a mandamus is the appropriate remedy: *High on Extraordinary Legal Remedies*, sec. 237. If the county have discretion whether to build the bridge at all they cannot be made to build it, but if it be their duty to build it they may be compelled to do so. Here it is by the statute made the duty of the county to build the bridge; they cannot therefore refuse altogether and unreasonably as they have done, though they may have a certain discretion as to its position and cost, and as to the number of bridges required. The two townships of Seneca and Oneida, which are chiefly interested in this work, pay one-third of the whole taxes of the county. They have no power to do the work themselves and they are prevented from getting the aid of the county because they are over-ruled by the other townships which do not happen to feel the want of the bridge, and do not want to pay for it. The demand made is quite sufficient: *Re School Trustees of Toronto and The City of Toronto*, 23 U. C. R. 203.

June 30, 1877. WILSON, J.—By the Municipal Act of 1873 sec. 410, as amended by the 37 Vic. ch. 16 sec. 17, O., the county council has exclusive jurisdiction over all bridges across streams separating two townships in the county: and by sec. 413, as amended by 37 Vic. ch. 16 sec. 19, O., it is the duty of county councils to erect and maintain bridges over rivers forming or crossing boundary lines between two municipalities (other than in the case of a city or separated town) within the county.

In this case the Grand River does form the boundary lines between the townships of Seneca and Oneida in the county of Haldimand.

The statute therefore does properly apply, and it is the duty of the county council to erect and maintain a bridge or bridges between these townships.



I do not think it is the absolute duty of the county council to build a bridge in every case over a river where two townships are divided by and have their boundary lines upon that river. If that were so the county would become answerable for not doing it, although there was not an inhabitant in the townships, and the convenience of the public did not require such a work. The mere fact that there is not a bridge over a river, which forms the boundary line between two townships in a county, would not of itself constitute a sufficient claim upon or charge against the county for not building one. There must be some other facts shewn or alleged to complete the statement of duty which rests upon the county, before a breach of that duty can be found or inferred from the mere fact that there is not a bridge in such a place.

I think therefore, the Court, before entertaining an application for a mandamus, may properly require all necessary facts and circumstances to be stated, from which it can be known whether a bridge is a reasonable work to order to be done to meet the requirements of the inhabitants of the locality or of the public generally, and whether the expense of it is a reasonable burden to be imposed upon the county upon a just consideration of their affairs, and the liabilities they have already incurred.

I have no doubt of the legal right of the Court to entertain this application, and to give effect to it by mandamus, but it is a power to be most cautiously used against a body which is acting *bonâ fide*, and against a people who are in general the only persons who are interested in the work, and whom we in effect order to be taxed. The general facts are these:

The Grand River flows from Caledonia to Dunnville, in a south-easterly direction.

The townships on the north side of the river are Seneca, Cayuga, Canboro, Moulton, and Sherbrooke.

Those on the south side of it are Oneida, North Cayuga, South Cayuga and Dunn, and away to the west of these latter townships, and still farther from the river, lie Rainham and Walpole.

The river flows between Oneida and Seneca.

Then part of North Cayuga is on the north side of the river, and the other part of North Cayuga and the whole of South Cayuga are on the south of the river.

And then it flows between Canborough and Moulton which are on the north side, and Dunn which is on the south side.

There is a bridge over the river at the Village of Caledonia, which is near the north angle of Seneca; then there is no other highway bridge over it before getting to the town of Cayuga, a distance of about twelve miles, and then no other bridge over it before getting to Dunnville, a nearly like distance of twelve miles.

The village of Caledonia is, as it has been stated, near the north-west corner of Seneca, and the town of Cayuga is about a mile to the east of the Seneca town line.

So that the whole extent of the boundary east of Caledonia on the river between Seneca and Oneida, and still further to the east to the town of Cayuga, a distance of twelve miles, is without a bridge.

The inhabitants in the centre part of that space must travel therefore six miles out of their way to go to either Caledonia or Cayuga in order to cross the river.

Seneca and Oneida pay about one third of the taxes of the county. They have each a population of about 3000.

That the county debt is about \$50,000, independently of the railway bonus of \$65,000, which latter sum is charged only upon Walpole, Seneca, Oneida, and the village of Caledonia: that the ratable property of the county is more than seven millions of dollars, and the tax to raise from \$10,000 to \$15,000 would be very light: that there was a bridge at York put up by a joint stock company about eighteen years ago, which was kept by the company until about three years ago, when they abandoned it because they were no longer able to maintain it; and that such bridge, dangerous as it is, is occasionally used, but that it is unfit for any use.

There is no doubt that a county possessing ratable property to the amount of \$7,000,000 could raise say \$15,000

by a loan at twenty years at six per cent. interest, and owing for every thing about \$110,000, without any difficulty. The annual instalment of \$15,000 would be about \$750, and the interest would be about \$900, or \$1,650 annually together, and that would be less than the 1-40th of a cent in the dollar per annum.

I am not so much influenced by the smallness of the burden upon each ratepayer in dealing with this case: I am anxious to be convinced that a full case for the interference of the Court has been plainly established.

That is the chief question, and in dealing with it I am not much influenced by the opposition made by the inhabitants of Walpole and Rainham, whose property and places of business lie in a different direction from those who live between the Caledonia and Cayuga bridges, and who may naturally enough, from mere personal and local interest, oppose what they may think to be only a sectional and not fairly a public matter.

It is difficult to determine such a case upon affidavits. The number of them on one side or the other will not of itself be of much consequence. It must be the position and respectability of the deponents, and the impression which may be made of the correctness of their statements, and their freedom from the imputation of trying merely to make a case for their own side.

For the application on this case from *Seneca* are the following affidavits: Adam A. Davis, reeve, and the warden of the county; also John Lynch, deputy reeve; David Thompson, mill owner; Thomas Martindale, plaster merchant; Nathaniel H. Wickett, butcher, and Charles Brooks, who describes himself as gentleman, but who is said by Mr. Stevenson, the county clerk, to be rated as a tenant and labourer for \$150 only.

They were made by persons very competent from their position and intelligence, and no doubt from the amount of their property also, to testify as to the facts they represented.

Then against the application from the township of

Seneca are the following affidavits: James McNiven, ex-reeve; John Kimel, farmer, and Charles Parke, farmer.

In favour of the application from the township of Oneida there are the affidavits of Hugh Stewart, reeve, and who was warden for 1876, and Alexander W. Thompson, plaster merchant.

While opposed to them from Oneida are the affidavits of Matthew Gill, an ex-reeve, and Leonard Farrell, farmer.

For the application from the township of North Cayuga there is the affidavit of James Jack, mill owner and manufacturer; and against it from North Cayuga are the affidavits of William Bullock, reeve; Anderson Foster, deputy reeve; and David E. Best, reeve for 1876.

Then for the application are also the affidavits of the following persons: David Thompson Rogers, of the village of Cayuga, reeve of the village; Jacob Baxter, of the same place, member of the Ontario Legislature; John DeCew, of the same place, county engineer; Thomas H. Aikman, of the same place, barrister; Jacob Digg, of the same place, mail carrier: and John Scott, reeve of the village of Caledonia for 1876.

And against it are the following affidavits: John Caldwell, reeve of Walpole, and ex-warden; Robert Buckley, deputy reeve of Walpole; George Start, deputy reeve, of Walpole; Hiram Gee, of Rainham, reeve; Wm. Holmes, of Rainham, engineer; Henry Lawe, of Dunnville, surveyor; and Charles Stevens, of Dunnville, engineer.

It appears then that North Cayuga, Walpole, Rainham, and Dunnville are, by a preponderance of evidence, adverse to the application.

That the village of Cayuga and Seneca are in favour of it; and that the weight of opinion is in favour of it in Oneida. And the member for the Local House, the county engineer, and the reeve of Caledonia are in favour of it.

The great adverse weight of opinion against the applications is from Walpole and North Cayuga.

Walpole I should not be surprised to find opposed to it, because it is so situated as to have nothing in common with



Oneida and Seneca as to the bridge; and North Cayuga is already fully served by the bridge at the town of Cayuga.

I am of opinion a case has been reasonably made out for relief: that so long a stretch as twelve miles in such settlements on each side of the river as there are between Caledonia and the county town, is too great a distance to be without a bridge across the river for the benefit of the neighbourhood and the public generally.

And from the evidence there is of the personal affairs and position of the county, it is not unreasonable to ask them to erect such a bridge at a cost of not more than about \$ , at or near to the village of York. The fact that there was a bridge at that place for so many years is some evidence of the usefulness and want there was felt for such a work, when it was undertaken by private enterprise, and was maintained for many years, and when it was aided on several occasions by the county and by the adjoining municipalities, and which failed at last from the want of means sufficient to carry it on.

This is not a case in which it is discretionary with the county to erect bridges or not upon all occasions and under all circumstances, without check or control.

It is their duty to do it by statute. That they have a very large discretion to exercise in such case is manifest, and I should regret if we were thought to be interfering with the legitimate exercise, or with the performance of any of their duties, but I do not think we are. It is not the rights of the inhabitants of the county only, we are to consider the rights and interests of the public generally. We are not, therefore, to be controlled by any argument that the people of the county can change by election of such representative who will do such work if required.

It may be well to note here some remarks of Mr. Justice Moss on the subject of granting or not granting the writ of mandamus, made in the case of *The Stratford and Lake Huron R. W. Co. and The County of Perth*, 38 U. C. R. 112, at pp. 155, 156.

It is only necessary to say that the 35 Vic. ch. 14, O., does

not apparently give an appeal from the judgment of the Court, excepting in cases which are appealed to the Court from the Judge.

Our statute has not, in my opinion, altered the prerogative nature of the writ. It is still to be issued, and a Judge may and is bound to order it, "provided he be of opinion that the case is a proper one for the issue of the same," and after hearing the parties the Judge "shall if in his opinion it is a proper case for the issue of the said writ," order it to be issued ; but if he do not think so he may refuse to issue it.

The fact that an appeal lies from the decision of the Judge does not alter the nature of the writ. The Court appealed to as well as the Court of last resort may still exercise its discretion and the party must submit in the end to the exercise of the discretionary power.

What Lord Chelmsford said in *Regina v. Churchwardens of All Saints, Wigan*, L. R. 1 H. L. D. 611, 620, is still as applicable to the writ of mandamus as it ever was : "A writ of mandamus is a prerogative writ, and not a writ of right, and it is in this sense in the discretion of the Court whether it shall be granted or not. The Court may refuse to grant the writ not only upon the merits but upon some delay or other matter personal to the party applying for it ; in this the Court exercises a discretion which cannot be questioned." I have already said our statute does not allow an appeal where the Court acts in the first instance.

Even the writ of *habeas corpus* is not a writ of right : *Newton's Case*, 13 Q. B. 716 ; *Rex v. Hobhouse*, 2 Chitty 207.

In the case in appeal, to which I have referred, the Judge in Chambers had granted the order for the writ, and this Court rescinded the rule. The case was therefore rightly before the Court of Appeal, and the observations of Mr. Justice Moss, if confined to that particular case, are well made. But so far as they exceed it they are not warranted by the general law, and I think they are warranted by the statute.

As to the proceeding by indictment, it is only necessary

to say we have not determined yet that an indictment will not lie in such a case as this. We have determined that an indictment could not be maintained against the county for not repairing a bridge built by a joint stock company which the company had abandoned, and which the people were using, because it was not a public highway, or if a highway it was not one which the county had adopted or could be compelled to adopt. They might, if a bridge were required, have elected to put it up in a different place. And there is nothing to prevent a mandamus issuing, although an indictment might be prosecuted for the same matter.

I think the rule should be made absolute, but I think it should not issue for some time yet, to afford the county council another opportunity of considering the matter; the writ not to issue till the 21st August, and not then if the county council appeal.

MORRISON, J. I am of opinion that a demand and refusal has been sufficiently shewn; and the only question we have to consider is, whether a case has been made for our interference. We were referred by Mr. Osler to the case of *Kinnear and the Corporation of the County of Haldimand*, 30 U. C. 398. The reasons which induced this Court to refuse a mandamus to build a bridge across the same river and between the same townships do not, in my judgment, appear in this case. There a bridge was required to be built at the village of Indiana, which is on the Grand River, midway between the town of Cayuga and the village of York, now in question, the distance between these points being about five miles and a half. When Kinnear's application was made, at both these places there were then bridges; consequently there was a bridge on either side of Indiana within say two miles and a half.

The Court in that case was of opinion that, as the corporation to some extent were entitled to judge of the necessity of erecting a bridge at Indiana, they were not satisfied under the circumstances that a case had been made

out to grant a mandamus to compel the erection of another bridge at Indiana; that opinion being principally based upon the ground of there being then bridges at Cayuga and York.

In the present case it appears there is practically no bridge at York, and the inhabitants of Oneida and Seneca have no means of crossing the river at any point between Cayuga and Caledonia, a distance of over eleven miles, nearly the whole length of the river boundary between those townships.

It seems to me, after a careful consideration of the affidavits on both sides, that the case made by the applicant shews the great necessity, convenience and advantages of a bridge at or near York. If the objection on the part of the corporation was based on the ground of locating it at York—that it ought to be at a point further up or down the river—we would not perhaps interfere. No such reason is, however, assigned, and the question resolves itself into the necessity of a bridge at that point, and obliging the corporation to be at the expense of building it.

Sec. 413, 36 Vic. ch. 48, O., which was repealed and re-enacted *verbatim* by 37 Vic. ch. 16, sec. 19, makes it the duty of the county council to erect and maintain bridges over rivers forming the boundary between two townships within the county; it is therefore a statutable duty cast upon the corporation, and the general rule of law is, that a writ of mandamus will be granted when a corporation refuses to perform such a duty; but as incident to that rule, in cases where it is clear or where it is obvious the performance necessarily calls for an exercise of the judgment and discretion of the county council, the Court would be slow to interfere where in the exercise of that discretion the corporation have upon reasonable grounds refused to comply with a request to perform the duty; for instance, if it appeared here, as it did in the *Kinnear Case*, that there were bridges across the river at short distances on both sides of York, and that the erection of a bridge at the latter place at a great expense, would be in effect building one for the



convenience of the persons residing near the termini of the bridge, it would be unreasonable to hold that necessarily a mandamus should issue to compel the county to erect and maintain at considerable expense a bridge under such circumstances. We must, therefore, before issuing a mandamus be perfectly satisfied that the corporation in refusing to erect the bridge in question has abused the discretionary power which is so implied in the performance of the statutable duty. We must see whether, on the part of the applicant, a fair and reasonable case has been made for a bridge at or near York, and if so, to consider the probable expense and the capability of the county to provide the necessary means.

As I have already said, I think the necessity for a bridge has been made out; and it seems to me that it is also shewn that in point of general convenience and advantage for residents of the two townships and other portions of the country, that at or near York is a suitable site and is there required, as there are no means of crossing the river between Caledonia and Cayuga. We may fairly assume it is the most convenient place: it was originally a place for a ferry: it was also selected as a site for a bridge by a Joint Stock Company who built a bridge there which was used for many years, and until recently, when the company abandoned it, and it has fallen into decay, and being so chosen as a crossing point no doubt induced travel and the use and probably the opening of leading and side roads on both sides of the river in connection with the bridge, besides connecting two of the most populous townships in the county, townships which appear to contribute one-third of the taxes of the whole county.

Then as to the means of the county, it appears fortunately to be very little in debt, and an expenditure, assuming the bridge would cost \$10,000, would not bear heavily upon the ratepayers. The kind of bridge and the question of expense would be one resting with the council itself.

On the whole I am of opinion the rule should be absolute.

HARRISON, C. J.—I cannot concur in making the rule absolute for a mandamus.

The question is, whether the rule should be made absolute for the issue of the writ of mandamus, commanding the Corporation of the County of Haldimand to erect a bridge across the Grand River at or near the village of York.

If it be the duty of the corporation to erect the bridge, I think the demand, followed as it was by a distinct refusal, may be held sufficient for the purposes of the application.

The general rule is, that before the Court will command the execution of the particular act or duty, the subject matter of the writ must be clear, and the duty itself must be a duty imperative, and not discretionary : Per Morrison, J., *Re Wescott and the Corporation of the County of Peterborough*, 33 U. C. R. 280, 284.

Mandamus will only lie to compel the performance of duties purely ministerial in their nature, and so clear and so specific that no element of discretion is left in their performance : See *High's Extraordinary Legal Remedies*, secs. 24, 34, 156, 176, 325.

Now, can it be said that it is so plainly the duty of the county council to erect and maintain a bridge across the Grand River, at or near the village of York, that no element of discretion rests in the municipal council.

The general rule is, that as to all questions connected with local and public improvements, such as erecting or maintaining bridges, concerning which the municipal bodies have necessarily some discretion, a writ of mandamus will not be granted : *State v. Freeholders of Essex*, 3 Zab. N. J. 214; *State v. Police Jury of Jefferson*, 22 La. An. 611; *Mayor, &c., of Michigan City, v. Roberts*, 34 Ind. 471. See further, *Dillon on Municipal Corporations*, 2nd ed., sec. 673; *High's Extraordinary Legal Remedies*, secs. 418, 419. But where the Court and not the municipal body is to judge of the necessity for the bridge or other public improvement the writ may be issued : *Commonwealth of Virginia v. Justices of Fairfax County Court*, 2 Va. 9; *The Commonwealth v. The Justices of Kanawha County*, *Id.* 499; *Ottawa v. The People*, 48 Ill. 233.

It is by sec. 413 of 36 Vic. ch. 48, O., made the duty of county councils to erect and maintain bridges over rivers forming or crossing boundary lines between two municipalities within the county. But it never could have been the intention of the Legislature by these general words to divest the councils of *all discretion* as to the number of bridges necessary in the county and the places where such bridges shall be erected, and to transfer *that discretion* from the representatives chosen by the people for the very purpose of looking after such matters to a Court of justice: See *Re Kinnear and Corporation of the County of Haldimand*, 30 U. C. R. 398; *Regina v. Corporation of the Township of McGillivray*, 38 U. C. R. 91; *Regina v. Corporation of the County of Haldimand, Ib.*, 396.

It is to be presumed that where a particular work is a necessity to the people of a county that their chosen representatives will so far look after the interests of their constituents as to do what is necessary, and failing that will be replaced by others more circumspect and careful in this particular: See *Mayor, &c., of Michigan v. Roberts et al.*, 34 Ind. 471, 479.

When the proposed work is not of such general importance as to benefit the people of the whole county or a majority of them, I should doubt the expediency even if convinced we had the power to command the work to be done at the expense of the county.

If the work be such that only a portion of the county, and that portion less than the half, is interested, and the county council will not in the interests of the ratepayers of the county undertake the work, it would be much better that the law should be amended so as to enable those really interested to do the work at their own expense, rather than we should attempt to force the majority to submit to the dictates of any particular ratepayer or of the minority of the ratepayers.

County councils are, as it were, local parliaments, with limited powers of self-government. Within their limits they are vested with the discretionary power to make laws

and incur expenditure on behalf of their constituents. In the absence of unequivocal language *controlling* the discretion, there should not, in my opinion, be any interference with it by Courts of justice. See *Ex parte Nelson*, 1 Cowen 417; *Hill v. Commissioners of the County of Worcester*, 4 Grey 414; *State v. Freeholders of Essex*, 3 Zab. 214. See further *New York and Harlem R. W. Co. v. New York*, 1 Hilt. N. Y. 562.

Indeed, so jealous are the Courts of encroaching in any manner upon such discretionary powers, that if any doubt exists as to the question of discretion or want of discretion, the Courts will decline to interfere: *State v. Warmoth*, 23 La. An. 76.

So far as this Court is concerned, the only decision directly bearing on the point clearly shews that the discretion of the council does exist.

In *Re Kinnear and the County of Haldimand*, 30 U. C. R. 398, Richards, C. J., said, p. 408: "It must be a matter of discretion with the county council where to build these bridges. It can never be the right of any one inhabitant to compel the expenditure of so large a sum of money as it would require to build these bridges, and at such place as such inhabitant might consider the best. \* \* No doubt it is of importance to the inhabitants of the village of Indiana and the residents of Seneca and Oneida in the immediate vicinity of the bridge; but if the county council in *their discretion* do not consider it necessary to build a bridge there at the expense of the county, we do not think we ought to compel them. \* \* We think, if it be the duty of the municipality of the county to erect bridges over rivers forming boundaries of townships, they must have a *discretion* as to the place where they shall be erected, and must be allowed to some extent to judge of the necessity of such an erection."

If we interfere as asked in the case before us, and order the expenditure of money for a public work which would be a tax on the ratepayers against their will as declared by their constitutional representatives, it is difficult to say



where we should stop. We may be asked not only to compel the erection of bridges but the opening of roads, the construction of sewers, and the doing of other works, as to the necessity for which the proper municipal councils must be the best if not the only judges. They have the power in the interest of the ratepayers, and at the expense of the ratepayers, to incur expenditure for such public works when necessary. If at the instance of a particular ratepayer, or of a minority of the ratepayers, these councils were coerced to undertake public works, there would, as it seems to me, be an undue interference with the whole economy of municipal government. See *Wilson v. The Mayor, &c., of New York*, 1 Denio 595.

The duty of a municipal council to keep a road or bridge, when once constructed by the council, in good repair is governed by entirely different considerations. When a road or bridge is constructed and open for public use it is only reasonable that it should be fit for the purpose intended. So long as it is open there is an invitation to the public to make use of it. But when there is no such road or bridge there can be no such invitation, and so no liability for non-repair. The fact that there is the liability for non-repair of existing public roads and bridges is, I think, an additional argument for leaving with the proper municipal council the power of deciding in good faith as to the number and position of such works, subject always to the direct control of the ratepayers, exercised in a constitutional manner at the annual municipal elections.

In my opinion the rule should be discharged.

*Rule absolute.*

THE THIRD NATIONAL BANK OF CHICAGO V. MORGAN COSBY  
AND EDMUND S. VINDEN.

*Promissory note—"American currency"—Pleading.*

A note made here, promising to pay V. or order, at Chicago, \$893, *American currency*: *Held*, a good promissory note.

To an action on such note, alleging it to be for the payment of \$893 "American currency, to wit, lawful money of the United States of America," defendants pleaded that American currency was and is certain paper notes or debentures issued by the government of the United States, which by their law passed current for certain purposes only and not universally; nor was the said American currency at the time of making said alleged note, nor is it lawful money of the United States, nor of any fixed or certain value: *Held*, a good plea, as denying the averments in the declaration that American currency was lawful money of the United States of America, and tendering a good issue as to matter of fact.

DEMURRER—Declaration by the plaintiffs as indorsees upon two promissory notes against the maker and indorser of them. After the statement of the promise to pay the amount of the note in American currency, the words "to wit, lawful money of the United States of America," were added. One of the instruments was as follows:

"Port Hope, 11th September, 1875.

Nine months after date for value received I promise to pay to E. S. Vinden or order, at the office of The Third National Bank of Chicago the sum of Eight hundred and ninety three dollars and six cents *American currency*, with interest at ten per cent. per annum.

A. MORGAN COSBY."

The other was in form similar to it.

The defendants by their eighth plea set out these notes in full, and pleaded that the notes were made in this province; and that *American currency*, in the notes mentioned, was at the time of their making, and has been and still is certain paper notes or debentures issued by and in the name of the Government of the United States of America, which by the laws of the United States passed, and still pass, current in the United States for certain purposes only, and not universally and for all purposes, and which purport to be promises to pay certain sums, the unit

whereof is denominated a dollar; but the dollar named in and represented by the said American currency is not equal in value to a dollar of money of the United States, nor was the said American currency at the making of either of the said notes, nor has it since been, nor is it lawful money of the United States, nor was it at the making of either of the said notes, nor has it since been, nor is it of any fixed or certain value, but was and is of variable and uncertain value; and that, except by the making and endorsing of the alleged notes, there was not at any time any contract between them or either of them and the plaintiffs with respect to the matters in the declaration mentioned.

Demurrer to the plea: because *American currency* signifies lawful money of the United States of America, and these words are used to denote that the notes are payable in the lawful money of the United States of America instead of the lawful money of the Dominion of Canada: because the defendants admit that the currency referred to in the plea passes current for certain purposes, and therefore it is lawful money of the said United States.

Joinder.

The defendants gave notice of exception to the declaration because:—1. The instruments therein mentioned are not promissory notes, by reason of their not being for the payment of any sum or sums certain in money or specie. 2. They are not promissory notes, by reason of their being for the payment of stated amounts in American currency and not payable in money.

The case was argued before Wilson, J., sitting for the full Court, on November 24, 1876.

*McMichael*, Q.C., *S. R. Clarke* with him, for the plaintiffs, referred to *Story* on Bills of Exchange, 4th ed., p. 38.

*T. M. Benson*, contra. The notes must, to be promissory notes, be payable in money: *Gray v. Worden*, 29 U. C. R. 535; *Palmer v. Fahnestock*, 9 C. P. 172; *Fahnestock v. Palmer*, 20 U. C. R. 307. In the last two cases it was held that instruments declared upon as promissory notes were not promissory notes because they were payable “with

exchange on New York." He referred to *Cushman v. Reid*, 5 P. R. 121, 20 C. P. 147; *Stephens v. Berry*, 15 C. P. 548; *Wood v. Young*, 14 C. P. 250; *Grant v. Young*, 23 U. C. R. 387; *Bettis v. Weller*, 30 U. C. R. 23.

*McMichael*, Q. C., in reply. The note can only be satisfied by the currency, which is lawful money of that country: *Greenwood v. Foley*, 22 C. P. 352.

March 2, 1877. WILSON, J.—The cases referred to do not constrain me to hold the facts which are pleaded to be a good answer to the declaration.

Why "current funds of the United States of America," which was the expression in *Bettis v. Weller*, 30 U. C. R. 23, (in which judgment I concurred), should not be sufficiently certain I do not at present perceive.

The cases of *Greenwood v. Foley*, 22 C. P. 352; *Stephens v. Berry*, 15 C. P. 548; *Cushman v. Reid*, 20 C. P. 147, which were payable in American currency, do not so decide the question.

A note made in the United States, and sued upon here, would be payable in American currency, or at what is called here, when estimated by our standard, a fluctuating and variable sum according to the rate of exchange. What difference then can it make *to express* in the note that it was to be paid in American currency, or in current funds? These funds or that currency can be estimated with just as great precision as any other foreign money or coin can be valued, and a note may be payable in foreign money as well as in the money of the country.

If a person did not know the name of the money of the country in which he wished to make his note or bill payable, why should he not describe it as payable in the currency of that country, or in the current funds of that country?

The case of *Gray v. Worden*, 29 U. C. R. 535, was in my opinion quite different, because the note there was payable in Canada bills.

There are several cases in which it has been held here that a note payable with exchange on New York is not a



promissory note, because the amount of it is made uncertain by the uncertainty of the exchange.

The case of *Pollard v. Herries*, 3 B. & P. 335, shews that a note may be a good promissory note payable "according to the course of exchange upon Paris," where the note was made. The plaintiff recovered at the rate of exchange at the time when he made the demand for payment, the note being payable at seven days sight. The presentation was not made till many years after the giving of the note.

In *Byles on Bills*, 12th ed., p. 81, it is said: "If a foreign bill be drawn, payable at sight, or at a certain period after sight, the acceptor will be liable to pay according to the course of exchange at the time of acceptance, unless the drawer express that it is payable according to the course of exchange at the time it was drawn *en espèces de ce jour*."

It is quite manifest that if one here draw a bill for \$1,000 at thirty days on one in England, who accepts there, that it is the understood and settled agreement by mercantile law that the acceptor fulfils his engagement if he pay such a sum in England, at the time when his acceptance falls due, as will purchase a bill to be transmitted from there to this country which will produce here the \$1,000.

At the time of acceptance that amount may not be known, for the real exchange may be always fluctuating. In effect the drawer may leave the rate of exchange to be determined by the law of the place at maturity of the acceptance, or he may make the rate of exchange the rate of the day on which he draws the bill: *Byles on Bills*, supra 78; or he may specify the rate of exchange in the bill itself or upon it: *Suse v. Pompe*, 8 C. B. N. S. 538.

If the drawer can specify in the bill the value at which the foreign money is to be estimated, and can make that the defined rate of exchange, and if he can say that the exchange is to be determined by the rate which it bore upon the date of the bill, and the drawer cannot say what that is in the foreign country where the acceptance and payment are to be made, and if he need not say anything of the exchange in the bill, and yet exchange will, as of

course, regulate the amount to be paid, what objection can there be to specify in the bill that it is to be payable with the current rate of exchange?

When a note is made here for \$1000 at thirty days with the current rate of exchange on New York, it is just as certain as if the note were made here payable in New York, because upon the maturity of the note the self same amount of money has to be paid in discharge of it.

Whether such a note is made payable *in New York* with the current rate of exchange on New York, or is made payable *in this country* with the current rate of exchange on New York, the means of determining the amount to be paid are alike in both cases. There is no more uncertainty in such a case than when an acceptor in London engages to pay \$1000 at thirty days afterwards.

His engagement is certain at the time he enters into it,—namely, that on such a day he is to pay a fixed sum of money ascertainable by a determined mercantile standard.

The cases in our Courts applicable to this point are, *Palmer v. Fahnestock*, 9 C. P. 172; *Wood v. Young*, 14 C. P. 250; *Grant v. Young*, 23 U. C. R. 387; and *Fahnestock v. Palmer*, 20 U. C. R. 307.

These cases do not directly affect the present decision, because here the contract is to pay in *American currency*, and that I must assume to be the lawful and current money of the United States. That currency is there just as fixed as our currency is here, but because it does not bear an unalterable value by our money standard is not a reason for avoiding the payment or validity of the notes which have been given by the defendant. It is just because the currency of the one country does differ from that of the other that the law of exchange has effect at all. It is by means of it that the different currencies of the world are regulated and equalized, so as to give to all persons concerned the true value of that commodity which they have bargained to pay or which they have bargained to receive. These notes, it will be observed, are made payable

in Chicago, but the words "and not otherwise or elsewhere," are not added.

I give judgment for the plaintiffs on demurrer. See *St. Stephen's Branch Railway Co. v. Black*, 2 Hannah N. B. 139.

*Judgment for plaintiffs.*

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The defendants appealed from the foregoing judgment, and the case was re-heard before the full court, in this term June 20, 1877.

*Benson*, for defendants.

*M. C. Cameron*, Q.C., with him, *S. R. Clarke*, for plaintiff.

The argument was similar to that before Wilson, J., reported ante p. 403.

June 30, 1877. HARRISON, C. J.—The first question is as to the legal sufficiency of the first and second counts as against the exceptions to the declaration.

The grounds of exception are:—

1. That the instruments declared on in the said declaration as promissory notes are not promissory notes, by reason of their not being for the payment of any sum or sums certain in money or specie.

2. That the said instruments are not promissory notes, by reason of their being for stated amounts in American currency, and not payable in money.

Each instrument is expressed to be for the payment of eight hundred and ninety three dollars of "American currency, to wit, lawful money of the United States of America." The amounts are payable "at the office of the Third National Bank, Chicago, in the city of Chicago, in the state of Illinois, one of the United States of America." The declaration does not disclose the fact, whether the instruments were made in Canada or in the United States. But it is broadly argued that, no matter where made, as they are for the payment of "American currency," although described in the declaration and admitted by the demurrer

for the purposes of the argument to be "lawful money of the United States of America," they cannot in Canada be held to be promissory notes.

Notwithstanding cases to some extent sustaining this argument, the learned Judge refused to give effect to it, and held the instruments described in the first and second counts of the declaration to be good promissory notes.

In my opinion the learned Judge was right. It is beyond dispute that an instrument to be a good promissory note under the Statute of Anne must be for the payment of money. But what is money? It is not necessarily either gold, silver, or paper. It is just what the people of the country, where the instrument is made, choose to treat as money, in other words, as currency. If the note be for the payment of what is deemed money, it is wholly immaterial in the money or currency of what country the note is made payable. It may be payable in coins, such as guineas, ducats, doubloons, crowns, or dollars, or in the known currency of the country, as in pounds sterling, livres, tournoises, francs, florins, &c., for in all these and in the like cases the sum of money to be paid is fixed by the par of exchange or the known denomination of the currency with reference to the par: *Story on Promissory Notes*, 3rd ed., sec. 17; *Story on Bills of Exchange*, 4th ed., secs. 43, 44, 45.

The cases cited shewing that instruments purporting to be promissory notes "with exchange on New York" are not promissory notes: *Palmer et al. v. Fahnestock*, 9 C. P. 172; *Fahnestock et al. v. Palmer*, 20 U. C. R. 307; *Wood et al. v. Young*, 14 C. P. 250; *Grant v. Young*, 23 U. C. R. 387; *Cushman et al. v. Reid*, 20 C. P. 147; *Saxton v. Stevenson*, 23 C. P. 503, may some day demand reconsideration: See *Byles on Bills*, 12th ed., 81; *Pollard v. Herries*, 3 B. & P. 335; *Suse et al. v. Pompe et al.*, 8 C. B. N. S. 538; *Leggett v. Jones*, 10 Wis. 30; *Smith v. Kendall*, 9 Mich. 241; *Hill v. Todd*, 29 Ill. 101; *Clauser v. Stone*, *Ib.* 114; but as they are not directly in point here, they may for the present be dismissed without further remark.



The Legislature of Canada in 1871 passed "an Act to establish a uniform currency for the Dominion of Canada," 34 Vic. ch. 4.

It declares that, "The denominations of money in the currency of Canada shall be dollars, cents, and mills, the cent being one-hundreth part of a dollar, and the mill one-tenth of a cent:" sec. 2. And that "the currency of Canada shall be such, that the British sovereign of the weight and fineness now prescribed by the laws of the United Kingdom, shall be equal to and shall pass current for four dollars eighty-six cents and two-thirds of a cent of the currency of Canada:" sec. 3, &c.

Provision is made for the striking of gold, silver, and copper coins, and for making the same under certain conditions a legal tender: secs. 6, 7, and 8.

Provision is also made for the declaring of certain foreign gold coins to be a legal tender in Canada: sec. 9.

The Legislature of the late Province of Canada had previously made provision for the issue of provincial notes, which by the Act were made a legal tender, except at certain offices named: 29 & 30 Vic. ch. 10, sec. 1.

That which is a legal tender for all purposes must certainly be currency, and that which is currency must be money, and ought, it seems to me, to be so held if the question were to arise for the first time. But we are pressed with the decisions of our own Courts in this Province, which are said to bear in favour of the contention of the defendants in this case.

In *Stephens v. Berry*, 15 C. P. 548, it was made a question whether an instrument purporting to be a bill of exchange, payable in New York "with current funds," meant anything *other* than "lawful money of the United States," and if so whether it was a good bill of exchange, but there was no decision on the point.

In *Gray v. Worden*, 29 U. C. R. 535, this Court, "after some hesitation," held, that "Due J. G., or bearer, \$482 in Canada bills, payable fourteen days after date," was not a good promissory note.

In *Bettis v. Weller et al.*, 30 U. C. R. 23, this Court held, that an instrument made in this Province, payable "in current funds of the United States of America," was not a promissory note, but Wilson, J., who concurred in that judgment, in referring to it now says, ante p. 404: "Why current funds of the United States of America \* \* \* should not be sufficiently certain, I do not at present perceive."

But in *Greenwood v. Foley*, 22 C. P. 352, the Court of Common Pleas a couple of years afterwards, not having had either of the foregoing cases cited to them, held, that a note, payable in the United States "in American currency," was a good promissory note, and as such might be sued on here.

It will thus be seen that the decisions in this Province are contradictory, and that the most recent case is directly in favour of holding the instruments, described in the first and second counts of the declaration, to be good promissory notes.

The decisions on the point in the United States are also contradictory.

The following, payable as indicated, have been held not to be promissory notes: "*in common currency of Arkansas*": *Dillard v. Evans*, 4 Ark. 175; "*in bank bills*": *Simpson v. Meneden*, 3 Cold. 429; "*in New York funds or their equivalent*": *Hasbrook v. Farmer*, 2 McLean 10; "*in current bank bills*": *Fry v. Rousseau*, 3 McLean 106; "*in foreign bills*": *Jones v. Fales*, 4 Mass. 245; "*in paper medium*": *Lange v. Kohne*, 1 McCord, 115; "*in current bank notes*": *Little v. Phoenix Bank*, 2 Hill, 425; "*in Pennsylvania or New York paper currency*": *Lieber v. Goodrich*, 5 Cow. 186; "*in current notes of the State of North Carolina*": *Warren v. Brown*, 64 N. C. 381; "*in current funds of Pittsburg*": *Wright v. Hart*, 44 Penn. St. 454; "*in current funds*": *Cornwall v. Pumphrey*, 9 Ind. 135.

The following, payable as indicated, were held to be good promissory notes: "*in current funds*": *Shoemakers Bank v. Street*, 16 Ohio N. S. 5; "*in current Ohio bank notes*":

*Swetland v. Creigh*, 15 Ohio 118; “in current funds of the State of Ohio”: *White v. Richmond*, 16 Ohio 5; “in funds current in the city of New York”: *Lacy v. Holbrook*, 4 Ala. 88, “in good current money of this State”: *Graham v. Adams*, 5 Ark. 261, “in York State bills or specie”: *Keith v. Jones*, 9 Johns. 120, “in bank notes current in the city of New York”: *Judah v. Harris*, 19 Johns. 144; “in North Carolina bank notes”: *Deberry v. Darnell*, 5 Yerg. 451, “in lawful current money of Pennsylvania”: *Wharton v. Morris*, 1 Dallas 124; “in foreign money”: *Sanger v. Stimpson*, 8 Mass. 260; “in currency”: *Buller v. Paine*, 8 Min. 324; *Hunt v. Divine*, 37 Ill. 137; *Swift v. Whitney*, 20 Ill. 144; *Laughlin v. Marshall*, 19 Ill. 390; *Peru v. Farnsworth*, 18 Ill. 563; *Drake v. Markle*, 21 Ind. 433; *Fry v. Dudley*, 20 La., An. 368; “in currency of the State of Mississippi”: *Mitchell v. Hewitt*, 5 S. M. & M., 361; “in currency of Missouri”: *Cockrell v. Kirkpatrick*, 9 Mo. 688; “in New York State currency”: *Ehle v. Chittenango Bank*, 24 N. Y. 548; “in legal tender currency”: *Huse v. Hamblin*, 29 Iowa 244; “in current funds”: *Phoenix Insurance Co. v. Allin*, 11 Mich. 501.

In *Daniel* on Negotiable Securities, secs. 55, 56, & 57, and notes, where the foregoing cases are collected, some attempt is made to reconcile them, but it is, I think, impossible for any one to do so successfully. See further *Byles* on Bills, 6th ed., by Sharswood, 92, and notes.

The most recent, and the most instructive United States decision which I have seen is *Black v. Ward*, 15 Am. 162, in which it was held, after an exhaustive review of the United States and Canadian decisions, including *Gray v. Worden*, 29 U. C. R. 535, that a note made in Michigan, payable in Canada “in Canada currency,” is a good promissory note.

The Court said, p. 169: “A note payable in Canada currency means no more and no less than that it is payable in Canada money at the Canada standard, and that it is governed, as to the amount it calls for, by the same rule as if it had been made in Canada, and payable in so many dollars, without containing any further direction.”

This decision, while opposed to *Gray v. Worden*, 29 U. C. R. 535, and *Bettis v. Weller*, 30 U. C. R. 23, is in accordance with *Greenwood v. Foley*, 22 C. P. 352, and fully sustains the sufficiency of the first and second counts, as against the demurrer to these counts.

In *Stephen Branch R. W. Co. v. Black*, 2 Hannay 139, it was held by the Supreme Court of New Brunswick, that a note made in that province, payable in that Province "*in United States currency*," was a good promissory note.

It is not necessary for us actually to go so far as to hold that a note made in this Province, payable in this Province in "*United States currency*," is a good promissory note; but where the note is payable in a foreign country, and expressed to be payable in the currency of that country, which currency by the pleadings is admitted to be "*lawful money*" of the United States, we must, according to the great preponderance of authority, hold that the note is a good promissory note.

The word "*currency*" may be held to imply "*lawful money*," and the words "*American currency*," "*American money*"; but the pleader has not left the matter to inference, for in each count the amount is described as "*American currency, to wit, lawful money of the United States of America.*"

Strictly speaking, the people of the United States of America have no more right to describe their money or their institutions as American than we, the people of Canada, to describe ours as American. Each country is no more than a portion of America. Neither country, therefore, is entitled to the exclusive use of the description "*American.*" But it may be, although judicially we know nothing of the fact, that "*United States currency*" is commonly called "*American currency.*"

The pleader by the use of the words to wit "*lawful money of the said United States*" has clearly removed any doubt which might otherwise exist in the use of the equivocal words "*American currency*," as applied to that portion of America known as "*the United States of America.*"



But while I agree with my brother Wilson in thinking that the declaration is good, I am unable to hold that the plea is bad. The plea after setting out each note sued on *in hæc verba*, and after shewing them to have been made in Canada, states that American currency, in the said alleged notes mentioned, was at the times of the making of the said alleged notes, respectively, and has ever since been, and still is, certain paper notes or debentures, issued by and in the name of the Government of the United States of America, which by the laws of the said United States passed, and still pass, current in the said United States for *certain purposes only*, and not universally and for all purposes, and which purport to be promises to pay certain sums, the unit whereof is denominated a dollar of money of the said United States; nor was the said "American currency" at the making of either of the said alleged notes, nor is it *lawful money of the United States, &c.*

The declaration alleges that "American currency" is "lawful money of the United States." The plea denies that fact, shews what American currency is, and tenders issue as to whether it is lawful money of the United States. The issue tendered is a good one, and involves an enquiry into the law of the United States, as to whether American currency, such as described in the plea, is *lawful money* in the United States. We cannot preclude defendants from this enquiry, although it may turn out to be of little practical value; for judicially we know nothing of the laws of the United States. We may, and often do, refer to the accepted decisions of the United States Courts, as illustrating what our own law is or ought to be in the absence of direct English or Canadian authority; but we cannot undertake, as Judges, in any particular case to decide what the law of the United States, or of any State of the Union, is, merely because of what we see stated in reports of decisions of Courts in that country. An enquiry into foreign law is an enquiry into a matter of fact. Whether in the United States that which is current only for certain

purposes is held to be money for the purpose of making a valid promissory note is an enquiry which without evidence we cannot make. While we hold that a note made in this country may be payable in a foreign country in the money of that country, and be held in this country to be a good promissory note, we are not prepared to hold that anything which one party to a suit calls money, and the other denies to be money, is money in the foreign country: Judicially we have no knowledge of "American currency." It may be something which is current for all purposes in one State, and not in the others of the United States. It may be something which is not current for all purposes in any State. It may be something which is not current for any purpose in any State. It may be anything or everything which the people of the United States of America choose to call it.

If defendants insist upon it, and are willing to risk the expense, there must be an enquiry into the facts alleged in the plea. If United States currency should be found to be such as described in the plea, and still be found to be the money of the United States, or money in the United States, as in the declaration alleged, the finding must be against the plea. But as the plea tenders a good issue as to a matter of fact, the plaintiffs, instead of demurring to it, must, in my opinion, take issue upon it.

The judgment will be for the plaintiffs on the exceptions to the declaration, and for the defendants as against the demurrer to the plea, and the decision of Mr. Justice Wilson modified accordingly.

As each party succeeds in respect of the pleading attacked by the other party, there should be no costs of the rehearing.

MORRISON, J., and WILSON, J., concurred.

*Judgment accordingly.*

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# RE BAIRD AND THE CORPORATION OF THE VILLAGE OF ALMONTE.

*By-law to grant bonus—Councillors interested in the company to be aided—Illegality—36 Vic. ch. 48, s. 75, O.*

A by-law to grant a bonus of \$10,000 to a manufacturing company was proposed by a council consisting of five members, of whom four were shareholders in the company. The by-law provided for raising that sum on debentures, but that the company should get nothing until they furnished evidence to the satisfaction of the council of being in *bona fide* working operation, and an institution otherwise worthy of the bonus, and that they had a *bona fide* paid up capital of at least \$5,000. The votes of the electors were taken on it on the 21st October, 1876, when it was carried by a majority of 23. On the 26th February, 1877, a motion was made to quash it, no debentures or money having yet been delivered. Three of the members for 1875 were again in the council for 1877, all being shareholders, and two of them directors of the company.

*Held, per* HAGARTY, C.J., and affirmed by this Court, that the by-law must be quashed; that under sec. 75 of the Municipal Act, 36 Vic. ch. 48, O., a councillor cannot vote on any question affecting a company of which he is a shareholder, even though at the time of election he was not disqualified under that clause, so that here there was no competent quorum to submit or pass the by-law; and that the vote of the majority of the electors could not be treated as a ratification, even if they were shewn to have been aware of the illegality.

February 27, 1877, *J. K. Kerr*, Q. C., obtained a rule *nisi* to quash by-law No. 75, passed 1st November, 1876, to aid the Almonte Furniture Company, by giving \$10,000 to it by way of bonus, on the grounds: that the same was not properly passed by the council of the village, or by a majority of the whole number of members required by law to constitute the council, and that there was no quorum present when said by-law purported to be passed: that the concurrent votes of at least three members of such council qualified to vote thereon were not given in favour of said by-law: that members of the said council, who were at that time shareholders in the said company, voted in the council on the by-law: that the necessary number of votes to pass the by-law was not given by members of the said council qualified to vote thereon: that the necessary number of votes to pass the by-law was not given by members of the council: that the by-law does not state the value of the whole real property ratable according to the last revised

or revised and equalized assessment rolls: that it does not state that the debt is created on the security of the special rate settled by the by-law, and on that security only: that the corporation of the village have no power to pass the by-law that no debentures, &c., shall be delivered unless the company shall have furnished to the satisfaction of the corporation evidence of being in *bonâ fide* working operation: that the by-law is *ultra vires*: that it is against public policy in this, that the council who have the discretionary power to deliver the debentures are interested in the company.

The by-law recited that the council was desirous of granting a bonus of \$10,000 in aid of the Almonte Furniture Company, and they must raise that sum, and that \$1600 in addition would be required to provide for the discount on the debentures. The assessed property was \$742,455.

It then provided for the granting the bonus, the issue of debentures, and the interest.

That no debentures or proceeds should be delivered to the company until they furnished, to the satisfaction of the council, evidence of being in *bonâ fide* working operation and of being an institution otherwise worthy of the said bonus, and to give satisfactory evidence to the council that they had a *bonâ fide* paid up capital of at least \$5,000.

The by-law was to come into operation on the 2nd of November, 1876, and the votes of the electors were to be taken on the 21st of October, 1876.

This by-law was sanctioned by the electors by a vote of 149 against 126, being a majority of 23.

The rule *nisi* for quashing, bore date 26th February, 1877. No debentures or money had yet been delivered.

It was sworn that the council consisted of five members when the by-law was first proposed and when it was passed, Joseph Jamieson, Reeve; McArthur, Deputy Reeve; Wylie, Young, and Tomlinson.

It was proved that four of these councillors, all except Wylie were shareholders in the company. In the council



for the present year the same reeve and deputy reeve have seats, so also had Tomlinson, all still shareholders and two of them are directors of the company.

It was shewn that in September last, when this Furniture factory was destroyed by fire, a public meeting in Almonte passed resolutions and petitioned the council to grant this aid to the company. Nine ratepayers were said to have signed it.

An extract from the minutes of the council shewed that the by-law was moved and seconded by two of the shareholding councillors, and when the vote was reported it was finally passed on the motion of Mr. Tomlinson, seconded by Mr. Young.

It is charged that some of the directors were personally responsible for some of the debts of the company.

In an affidavit Mr. Rosamond, the President of the company, spoke of a chattel mortgage which existed at the time of the fire, and that the directors had endorsed the company's notes up to the sum of \$2560, and that now, 19th March, 1877, only \$1300 remained unpaid thereon.

The shares in the company were of the nominal value of \$50 each. It was not stated whether they were paid up in full or not. If the original stock had not been fully paid up, the shareholders would remain personally liable to creditors for the unpaid portion. It was stated in argument that since the fire the shares have been reduced to \$10 each.

March 20, 1877. *Osler*, shewed cause.

*Kerr*, Q.C., supported the rule.

[The arguments were similar to those on the re-hearing, post p. 422.]

March 23, 1877. HAGARTY, C. J. C. P.—The affidavits are full of charges and counter charges not necessary to particularize, and in no way affecting my decision.

The furniture company, its standing and prospects, and the benefits alleged to be conferred by it on the village are discussed with great freedom of speech.

It is urged that on the the faith of getting this bonus large works have been undertaken and heavy expense incurred, and that great loss and damage must accrue to the company if the by-law be quashed.

It is complained that the application has been improperly delayed. On the other hand some reasons are assigned explaining the delay, and asserting that it was well known that the by-law would be attacked.

I am of opinion that I must dispose of this application without reference to the lapse of time.

It was conceded on the argument that there has been no legislation since the last general Municipal Act to affect this case.

It was also conceded that this was a case in which the council was not bound on receiving any requisition or petition to submit such a by-law to the ratepayers.

The facts disclosed in this case are of a most extraordinary nature. It remains to be seen whether they present a result as contrary to law as they are repugnant to our sense of justice and fair dealing.

We have five councillors, trustees for the municipality, bound to exercise all due care and skill in the management, bound to make the public interest their sole charge, and in no way to permit their personal interests in any way to be served or advanced in their disposition of the public revenues.

Four of the five are directly interested in this furniture company as shareholders, if not as persons responsible individually for the debts of that company, and pass a by-law for the making a present to it of \$10,000 to assist it in its difficulties.

When the by-law has been sanctioned by the electors, it is left to the discretion of the same council or its successors, consisting again of a majority of shareholders, two of whom are directors, to give the debentures or their proceeds to the company on being satisfied of its being in good working operation and "worthy of the bonus."

The directors of the company are to satisfy two of their

own body, and a third their co-shareholder, and then are to get this large sum as a free gift.

Such a proceeding seems to take away all the ordinary safe-guards provided by law for the government of trustees, and the protection of the public interests.

I hardly think that, apart from statutory provisions, such conduct could not be reached and such proceedings stayed by the ordinary powers of equity.

On turning to the Municipal Acts we find sec. 372 subsec. 5, empowers this council to grant aid by way of bonus, for the promotion of manufactures within its limits, by granting such sum or sums of money, to such person or body corporate, and in respect of such branch of industry as the municipality may determine upon, with directions as to obtaining the assent of the ratepayers.

Section 75 disqualifies certain named persons from being councillors: "No person having by himself or his partner an interest in any contract with or on behalf of the corporation, shall hereafter be qualified. \* \* Provided always that no person shall be held to be disqualified \* \* by reason of his being a shareholder in any incorporated company having dealings or contracts with the council of such municipal corporation, or by having a lease \* \* of any property from the corporation, but no such leaseholder shall vote in the council on any question affecting any lease from the corporation, *and no such shareholder on any question affecting the company.*"

When the shareholders were elected their company had no dealings or contracts with the municipality, and so were under no disqualification.

But I hardly think it can be contended that because there was no literal disqualification for election when elected, that when after election the company have dealings or contracts with the council the councillors who are shareholders or directors of the company so commencing to deal or contract with the council, can by their votes either make a contract with the company or vote money to aid such company.

It would be directly against the spirit, if not the letter of section 75.

Section 327 may be read in connection with this: "In case a member of the council, \* \* either in his own name, or in the name of another, \* \* either alone or jointly with another, enters into a contract of any kind, or makes a purchase or sale, in which the corporation is a party interested, and which is on that account void or voidable in equity, the same, contract, purchase or sale, shall also be held void in any action at law thereon against the corporation."

See also section 272, as to investing surplus moneys, that no member should take part in or in any way be a party by or on behalf of the corporation, &c., &c., and he shall be personally liable for any loss sustained by such corporation.

I think that on a proper construction of section 75 a councillor cannot vote on any questions affecting the company of which he is a shareholder, even where at the time of his election he was not disqualified under that clause.

In this view there was no competent quorum of three to vote for this by-law.

But again, the final arrangement with the company in handing over the debentures or money to them, was to be made in the judgment and discretion of the council. This, the final completion of the whole proceeding, had not taken place when this application was made.

It would rest with the new council to exercise this most vitally important duty, requiring the gravest and most disinterested deliberation on the part of the council as guardians of the public interests.

This new council out of five members contains three shareholders of the company.

I am clearly of opinion that these three members are prohibited by statute from voting on this important matter, and without their votes no quorum could exist.

When they were elected in January there was a very large dealing, if not strictly a contract, existing between the company and the corporation. A matter of the pay-



ment of \$10,000 of public money to the company on their satisfying the judgment of the council as to their honest compliance with certain conditions.

The moment the proposition is made that public money shall be voted to this company on their satisfying the council in certain particulars, it seems to me that then the disqualification to vote thereon must attach.

I cannot believe it possible that the law of the land can tolerate such a course of proceeding as has been attempted on the part of this council of Almonte.

I am not in the least impressed by the vehement swearing as to the wisdom and propriety of this large gift to this furniture company, or as to the benefit it may be to the village, or as to the vote of the rate-payers, by which a small majority declared that the property of the minority as well as their own must be taxed to help a particular mercantile company.

If the people of Almonte still desire to give such a sum as \$10,000 to this company, I think it must be done through some purer means, and by the unbiassed judgment and deliberations of a municipal council not composed of the shareholders or directors of the company, who are to vote public money to help or restore the commercial standing of their own firm or business, and possibly to pay debts for which they are individually liable.

The Legislature has conferred power on municipalities to grant these aids to trading companies, if a majority of the electors can be procured to sanction them.

It is left to the council to decide whether any or no security shall be required for such aid, or any guarantee for the carrying on of the business as desired by the community.

As the law stands a tottering firm or company can receive a large aid from public money—may apply all or the bulk of the aid towards paying off existing debts, and three, six, or twelve months afterwards may collapse, and thereby defeat the object of the defrauded rate-payers.

I know nothing of this furniture company or of its position beyond what the affidavits disclose. It remains for the people of Almonte and other municipalities to consider how far they advance the public interests by advances like these for purposes of supposed local benefit, without any security for the reasonable attainment of the desired object.

As to any inconvenience or loss to be sustained by the quashing of this by-law, we may regret it, but we should far more earnestly regret and deplore that the municipal laws of Ontario could be held to allow of such an extraordinary violation of all the principles by which public bodies ought to be governed in their dealings with public moneys.

I think the by-law must be quashed, with costs.

*Rule absolute.*

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From this judgment the corporation appealed. The cause was reheard May 28, 1877.

*Bethune*, Q.C., with him *Osler*, for the corporation. Under the Municipal Act, sec. 372, sub-sec. 5, the council had no discretion, they were bound to pass this by-law. There may now be a discretion in the council to submit the by-law to the rate-payers, but once submitted there is no further discretion. The members of the council and the rate-payers are not in the position of or subject to the rules of law which apply to trustees and *cestui que trust*. Here voters and council are at arm's length, and the imputation of fraud is rebutted. The position of the council was well known to the voters, it was perfectly understood that many of them were shareholders. That is shewn by the evidence of the highest rate-payers in the village; and now, after expense has been incurred, the buildings put up and most of the machinery put in, it is a gross breach of faith on the part

of the rate-payers to interfere. It is in the highest interests of the rate-payers that the building should be finished and set going. The utmost safeguard for the public interest have been provided by the by-law. The money is not to be handed over till the works are to the satisfaction of the council in *bonâ fide* working operation, and otherwise an institution worthy of the bonus, and having a *bonâ fide* paid up capital of \$35,000. There is no direct statute precluding members of the council from acting as they have done here, and no direct authority. The affidavits also are contradictory, and no by-law should be quashed on such evidence: *Helm v. Corporation of the Town of Port Hope*, 22 Grant, 273. They also cited *Grier v. St. Vincent*, 13 Grant, 512, 521; *Taylor and the Corporation of the Township of West Williams*, 30 U. C. R. 337; *Hill v. Municipality of Tecumseth*, 6 C. P. 297; *Regina v. Great Western R. W. Co.*, 13 Q. B. 327, 332; *Harrison's Municipal Manual*, 3rd ed. 186; *Sutherland v. Municipal Council of the Township of East Nissouri*, 10 U. C. R. 626; *Re Slavin and the Corporation of the Village of Orillia*, 36 U. C. R. 159; *Coles v. Trustees of the Village of Williamsburgh*, 10 Wend. 661.

*J. K. Kerr*, Q. C., with him *W. R. Mulock*, contra. The fact that the council are entrusted by the Municipal Act with a discretion to submit or refuse to submit the by-law to the rate-payers, affords an argument that the Act contemplated that discretion being exercised by parties disinterested in the result: *Re North Simcoe R. W. Co. and the City of Toronto*, 36 U. C. R. 101. See also *Re Peck and the Corporation of the County of Peterborough*, 34 U. C. R. 129. The illegality of this by-law arose on its inception, because it was not in fact submitted, the majority of the council being incapable of voting under sec. 75 of the Municipal Act, which though allowing members of the council to be stockholders in companies dealing with the council, does not allow them "to vote on any question affecting the company." The contract was void—but supposing it to be only voidable, this is an application in effect

to avoid it. There is no evidence that the rate-payers were made acquainted with the facts of the case. The company is not needed in the village, there being similar establishments there. This is an attempt at all events to some extent to pay off the private indebtedness of the members of the council who are shareholders. The by-law has not been properly promulgated or advertised. *Helm v. The Corporation of the Town of Port Hope*, 22 Grant, 273, does not apply, there the council had no discretion at all. The council can make no profit from their official position. They cited *Re Wright and the Corporation of the Cownship of Cornwall*, 9 U. C. R. 442; *Daniels v. Municipal Council of the Township of Burford*, 10 U. C. R. 478; *Municipality of the Township of East Nissouri v. Horseman*, 16 U. C. R. 576, 583; *Regina ex rel. Patterson v. Clark*, 5 P. R. 337; *Regina ex rel. Fluett v. Gauthier*, 5 P. R. 24; *Regina ex rel. Moore v. Miller*, 11 U. C. R. 465; *Towsey v. White*, 5 B. & C. 125; *City of Toronto v. Bowes*, 4 Grant 489, 504, 6 Grant 1; *Pirie and The Corporation of the Town of Dundas*, 29 U. C. R. 401; *Re Nash and McCracken*, 33 U. C. R. 181.

June 30, 1877. HARRISON, C. J.—The Court has power to quash a by-law of a municipality moved against on the ground of illegality, whether the illegality be apparent on the face of the by-law or be shewn *aliunde*.

The by-law is moved against on the ground of illegality in the submission and passing of it, there not having been, as it is contended, a duly qualified quorum of members of the council who voted for it.

Whether the by-law be legal or not must depend on its purpose, and the circumstances attending the submission and passing of it.

If submitted and passed by persons who were not competent, the by-law cannot receive any validity from the fact that it was approved of by a majority of the duly qualified electors.

When a council consists of only five members the con-



current votes of at least three are necessary to carry a municipal by-law : Sec. 177 of 36 Vic., ch. 48, O.

The by-law in question was passed or attempted to be passed under sec. 372, sub-sec. 5 of the Municipal Act.

That section enables the council of every county, township, city, town, and incorporated village to pass by-laws for granting aid by way of bonus for the promotion of manufactures within its limits, by granting such sum or sums of money to such person or body corporate, and in respect of such branch of industry as the municipality may determine upon, and to pay such sum either at one sum or in annual or other periodical payments, with or without interest, and subject to such terms, conditions, and restrictions as the municipality may deem expedient ; provided that no such by-law shall be passed until the assent of the electors has been obtained in conformity with the provisions of the Act in respect of by-laws for creating debts.

The municipality granting aid is empowered to take and receive security for compliance with the terms and conditions upon which the aid may be given.

The powers conferred by the section can only be exercised by and through the instrumentality of the members of the council, subject to and with the assent of the electors.

These powers are exceptional and liable to abuse. The exercise of them must therefore be closely scrutinized. See *Allen v. The Inhabitants of Jay*, 11 Am. 185 ; *Brewer Brick Co., v. The Inhabitants of Brewer*, 16 Am. 395.

The by-law is for granting a bonus of \$10,000 in aid of the Almonte Furniture Company, and provides for the issue of debentures for the amount of the bonus, discount and interest. It is subject to the condition that no debentures or proceeds shall be delivered to the company until the company furnish to the satisfaction of the council evidence of being in *bonâ fide* working operation, and of being an institution otherwise worthy of the bonus. The company is also by the by-law required to give satisfactory

evidence to the council that they have a *bona fide* paid up capital of at least \$35,000.

It is obviously necessary for the protection of the rate-payers, that the council—that is, that the persons to whom these extraordinary powers are delegated—should be free from interest, and in a position to exercise an honest and unprejudiced judgment upon the matters submitted for their decision. But the fact is, that when the by-law was first read four out of the five councillors who read it and submitted it for approval of the rate-payers were shareholders in the company, and three of these are still members of the council.

The by-law was, on 21st October, 1876, submitted to the vote of the electors, and was carried by a majority of only 23.

It was afterwards passed by the council of 1876, being the same council who submitted it to the vote of the electors, and took effect on 2nd November, 1876.

The settled rule in equity is, that he who is entrusted with the business of others cannot be allowed to make such business an object of interest to himself: *City of Toronto v. Bowes*, 4 Grant 504. The reason of the rule is, that one who has power will, owing to the frailty of human nature, be too readily seized with the inclination to use the opportunity for securing his own interest at the expense of that with which he is entrusted: *Governor, &c., York Buildings v. McKenzie*, 8 Brown P. C. 42.

The Municipal Act fully recognizes the wisdom of this policy, when it prohibits any member of a municipal council from being in any way a party to the investment of municipal money, sec. 272—declares that no person having by himself or his partner an interest in any contract with, or on behalf of the corporation shall be qualified to be a member of the council, sec. 75, and avoids the contract in any action thereon at law against the corporation: Sec. 327.

So rigorously was the law in these respects enforced, that a shareholder in an incorporated joint stock company

having a contract with the corporation was at one time held to be within the mischief and operation of the Act: *Regina ex rel. Coleman v. O'Hare*, 2 P. R. 18, but afterwards the law was relaxed by permitting a shareholder of a company having a contract with the corporation to become a member of the municipal council, but with this declared qualification, *that no such shareholder shall vote in the council on any question affecting the company*: Sec. 75, at the end.

The question whether aid shall be granted by a municipal corporation to an incorporated trading company therein is certainly a question affecting the company, and whatever reasons may be assigned for preventing such shareholder voting where the question arises out of contract are applicable in the case of the proposed grant of a bonus to the company.

It is our duty to give to the language of the Act such broad and liberal interpretation as will be most conducive for the suppression of the mischief designed to be prevented.

The language of section 75 is, "that no person shall be held to be disqualified from being elected a member of the council of any corporation by reason of his being a shareholder in any incorporated company having *dealings* or contracts with the council of such municipal corporation,

\* \* \* but no such shareholder shall vote on *any question* affecting the company."

The words are broad enough to prevent voting on such a by-law as the one now before us; and as the evil contemplated is evident, and the words used general, they should be so construed as to extend to all cases which come within the mischief intended to be guarded against, and which can be fairly brought within the words.

We in this respect agree in the decision of the learned Chief Justice of the Common Pleas.

It is, however, argued that as the by-law was submitted to the electors and carried by a majority of the duly qualified municipal electors, it is the duty of the council which

submitted the by-law to pass the same: sec. 236; and that this the council must do although disqualified to vote: *Regina v. Great Western R. W. Co.*, 13 Q. B. 327.

But in answer it is to be observed that the illegal taint affects this by-law from its inception. It was in the discretion of the council to submit such a by-law to the people: *In re North Simcoe R. W. Co. and the City of Toronto*, 36 U. C. R. 101. The council which submitted the by-law was not competent to do so, and might, we apprehend, have been restrained on a proper application for the purpose to the Court of Chancery: *Helm v. Corporation of the Town of Port Hope*, 22 Grant 273. This, however, is not the only remedy. Where a by-law is originated and passed under circumstances which make the passing illegal, either because passed under circumstances not authorized by law, or by persons not competent to pass it, there can be no doubt of the power of the Court, on a proper application, to quash it.

Although the motives of the members of a municipal council or the influences under which they acted, cannot be brought to nullify a by-law within their corporate powers, duly passed in legal form at a regularly convened meeting—*Borough of Freeport v. Marks*, 59 Penn. St. 253—yet where it is made to appear that the persons who assumed to originate and pass it were incompetent to do so, there is nothing to prevent the Court declaring the by-law invalid.

The law prohibits persons acting as magistrates who have any pecuniary interest in the subject under investigation. Interest however slight on the part of convicting justices invalidates a conviction: See *Regina v. Hammond et al.*, 9 L. T. N. S. 423; *Regina v. Allan et al.*, 4 B. & S. 915; *Regina ex rel. Harbison v. Meyer et al.*, L. R. 1 Q. B., D., 173.

The Court ought not to give less effect to an Act of the Legislature which prohibits members of a municipal council having an interest as shareholders of an incorporated



company from voting on any question affecting the company.

It is in the discretion of the members of a municipal council to submit a by-law for granting aid to an incorporated company, such as described in sub-section 5 of section 372 of the Act, and this discretion should be the result of an honest and disinterested exercise of judgment on the part of members of the council. It is not possible to expect such an exercise of judgment where members of the council, or a majority of them, are also shareholders of the company to which the aid is proposed to be given. To sanction such a proceeding would be to sanction something which is not only opposed to the language of the Act but opposed to old and well understood principles of law.

It is, argued that it was in the power of the rate-payers to ratify the illegal conduct of any of the council in submitting the by-law, and that a majority of the ratepayers, although small, have by their vote ratified it. Ratification implies knowledge. We are not satisfied that the majority of the rate-payers had, at the time of the voting, the knowledge necessary to enable them to ratify or to make their conduct in voting for a by-law so submitted a ratification of the illegality in the submission of it. Besides, we doubt the power of a majority of rate-payers voting at an election to override the plain provisions of an Act of Parliament made for the protection of rate-payers generally. It appears to us that so long as there remained a single dissatisfied rate-payer, his right to invoke the aid of the Courts for the carrying out of the law is not to be lost because the majority of the rate-payers may be disposed to acquiesce in a breach of the law.

We do not mean to impute any corrupt motives to any of the gentlemen who being stockholders of the company were also members of the council, and instrumental in the submission and passing of the by-law moved against. It may be that their motives were pure, and their aims patriotic. We say nothing to the contrary. But it is

better that men, however respectable, honest, or honourable, should not be placed in such a dual position as to render their motives and their actions open to misconstruction.

We cannot be too careful in seeing that members of municipal councils are not only free from corrupt conduct, but if possible free from all suspicion of corrupt conduct.

The Legislature, in the Municipal Act, recognizing the possible weakness of men when placed in positions of temptation, have made provision against their being so placed, and when so placed for their conduct in such positions.

These provisions are safeguards for the protection of rate-payers against the possible abuse of power. It is our duty to see that these provisions are respected and enforced.

The decision of the Chief Justice of the Common Pleas must, in our opinion, be affirmed, with costs.

MORRISON, J., and WILSON, J., concurred.

*Appeal dismissed.*

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BROCKVILLE AND OTTAWA RAILWAY COMPANY V. CANADA  
CENTRAL RAILWAY COMPANY.

*R. W. Co.—Power to draw Bills—Liabilities for money paid.*

The defendants desiring to raise money drew a bill and requested the plaintiffs to endorse for their accommodation, which the plaintiffs did, and defendants having discounted and failed to meet it, the plaintiffs paid it to the bank. Held, that assuming that the defendants had no power to draw the bill, they were nevertheless liable to the plaintiffs as for money paid for them.

THIS was an action to recover the amount of a bill of exchange drawn by the defendants, payable to their own order, upon the Hon. A. B. Foster, and endorsed to the plaintiffs' company.

The declaration contained a count on the bill; and the common counts were added at the trial.

Pleas, that defendants did not endorse, and never indebted.

The cause was tried before Gwynne, J., at the Brockville Spring Assizes, without a jury, and a verdict was entered for the plaintiffs for the amount claimed, \$5,039.38.

It appeared from the evidence given at the trial that at the time the bill of exchange now sued on was given, the plaintiffs' company and the defendants' company were under the same management; that this bill was one of a number of accommodation bills so made to enable the defendants to raise money for the use of their railway, and which was done to the amount of \$37,000, the defendants drawing the bill by their president, payable to the defendants' order, and endorsed by the defendants by their president and treasurer to the plaintiffs, who endorsed it to the Montreal Bank, the latter advancing the money upon the faith of such bill to the defendants' company, which money was used for the purposes of the defendants' railway; and that the defendants failing to pay the bill at maturity the plaintiffs, being called upon, paid the amount to the bank.

At the trial it was contended on the part of the defen-

dants that they were not liable on the bill, as they had no authority to draw or endorse any such bill; and on the part of the plaintiffs, that as the plaintiffs paid the amount they were entitled to recover as for money paid for the defendants.

During this term, May 25, 1877, *J. K. Kerr*, Q. C., obtained a rule to enter a verdict for defendants, pursuant to leave reserved.

During the same term, June 2, 1877, *S. Richards*, Q. C., shewed cause. The defendants are liable, at all events, to repay this money to the plaintiffs as money paid to their use. The bills were endorsed by the plaintiffs for their accommodation, and the defendants having discounted them and got the money upon them have, by leaving the plaintiffs to take them up, sufficiently requested them to pay the money for them. He cited *McGregor v. Rhodes*, 6 E. & B. 266; *Smith v. Marsal*, 6 C. B. 486; *Ashpitel v. Bryan*, 3 B. & S. 474; *Byles on Bills*, ed. 1876, 155; *Bleaden v. Charles*, 7 Bing. 246; *Reynolds v. Doyle*, 1 M. & G. 753; *Driver v. Burton*, 17 Q. B. 989.

*Kerr*, Q. C., contra. The defendants have no power to make notes; they have only power to make bonds, debentures, &c., and other securities. "Other securities" mean securities such as bonds, &c. The Brockville and Ottawa Railway Co. had no power to endorse for accommodation, and there has been no request for them to pay. The president may be liable; the defendants are not. He cited *Brice on Ultra Vires*, 2d ed. 32, and cases there collected; *Laing v. Taylor*, 26 C. P. 416; *Commercial Bank v. G. W. R. Co.*, 22 U. C. R. 233; *Barton v. Corporation of the Town of Dundas*, 24 U. C. R. 273.

June 30, 1877, MORRISON, J.—The plaintiffs contend that under any circumstances they are entitled to recover the amount as money paid for the use of the defendants, and I am of opinion that they are so entitled.

It is, I think, clear from the evidence, considering the



connection between these two companies as well as the transactions between them, 'that the real nature of the transaction amounts to this: the defendants desired to raise money for the use of their railway through the assistance of the plaintiffs' company by their becoming surety for the defendants, and in order to obtain a loan or advance from the bank the president of the defendants' company drew this bill and requested the plaintiffs to endorse the bill for the accommodation of the defendants,—the plaintiffs' company under sec. 13, 16 Vic. ch. 106, having authority to become parties to and to endorse bills of exchange by their president and treasurer. The plaintiffs having so endorsed the bill, the defendants obtained the advance of money from the bank on the credit of such endorsement. The defendants were primarily liable to repay the bank the amount, but having failed to pay at the maturity of the bill the plaintiffs, as endorsers and sureties for the defendants, being liable to pay the amount of the bill, paid the same to the bank.

Can it be said that a payment under such circumstances was not a payment on account of these defendants? By such payment the defendants were discharged of their liability to the bank.

As said by Bayley, J., in *Pownal v. Ferrard*, 6 B. & C. 439, 444: "If I pay your debt because I am forced to do so, then I may recover the same; for the law raises a promise on part of the person whose debt I pay to reimburse me."

And in the same case Holroyd, J., said, p. 445: "It is said that the plaintiff by making this payment was only remitted to his remedy upon the bill"; but I am of opinion that the plaintiff is entitled to recover in the action, (count for money paid), upon the same principle upon which a surety is entitled to recover money from his principal. I think that a party is not bound to resort to the original engagement unless it be by deed, but that he may at his election found his action upon the original engagement, or bring *indebitatus assumpsit* for money paid."

In *Sleigh v. Sleigh*, 5 Ex. 516, which was a case some-

what like this, where the plaintiff endorsed an accommodation bill for the defendant who negotiated it, and having paid the holder part, sued the defendant for money paid. Park, B., p. 516, in giving judgment said: "Here the money paid clearly discharges *pro tanto* the liability of the defendant, as acceptor, to the holder; and it is also clear, that there was no express request from the defendant to the plaintiff to pay the money. It remains, therefore, to be seen whether there was, from the circumstances, an implied request for him to do so. Now there is no doubt, that if a person lends his name to another for his accommodation, the party accommodated undertakes to pay the bill at maturity, and further to indemnify the person accommodating him, in case that person is compelled to pay the bill for him: *Byles on Bills*, p. 94. And this, no doubt, is an implied authority to such person to pay it, if he be in that situation that he may be compelled in law to pay the bill, though the holder do not actually compel him to do so; and after payment he may sue the party accommodated for money paid on his account; for such payment is, in truth, under the implied authority given by the contract of accommodation between the parties."

Pollock, C. B., in *Brittain v. Lloyd*, 14 M. & W. 762, p. 773, said: "If one ask another, instead of paying money for him, to lend him his acceptance for his accommodation, and the acceptor is obliged to pay it, the amount is money paid for the borrower, although the borrower be no party to the bill, nor in any way liable to the person who ultimately receives the amount."

In this case the plaintiffs having endorsed the bill to the bank they were liable to pay the amount, and having done so are entitled to recover the amount in this action as money paid for the defendants. Assuming the defendants were not liable upon the ground of their president having no authority to draw or endorse a bill of exchange, nevertheless the defendants were liable to the bank, as for so much lent and advanced to them, the bank at the same time holding the endorsation of the plaintiffs on the bill as security for the repayment of the amount advanced.

Taking any view of the case, the money advanced to the defendants by the bank was in the nature of a loan, for the repayment of which the plaintiffs became sureties, and having paid the amount it is but just and equitable that the defendants should reimburse the plaintiffs as for money paid for them.

In *Johnson v. Royal Mail Steam Packet Co.*, L. R. 3 C. P. 38, Willes, J., in giving judgment, at p. 43, referring to the answer set up by the defendants against reimbursing the plaintiffs for having had to pay money for which the defendants were liable in the first instance, said: "Of course there is, upon the surface, that by the law of this country, differing, it is said, in that respect from the civil law, nobody can make himself the creditor of another by paying such other's debt against his will or without his consent; that is expressed by the common formula of the count, for money paid for the defendant's use, *at his request*. That is the general rule, undoubtedly, but it is subject to this modification, that money paid to discharge the debt of another cannot be recovered unless it was paid at his request, or under compulsion, or in respect of a liability imposed upon that other."

On the whole, I think, the verdict ought not to be disturbed, and that the defendants' rule be discharged.

HARRISON, C. J., and WILSON, J., concurred.

*Rule discharged.*

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## ANN CAHUAC V. MARIA JANE COCHRANE.

*Ejectment—Statute of Limitations—Acknowledgment of title.*

In ejectment the defendant claiming by length of possession, it appeared that W. S. went into possession in 1855, claiming through J. W., who had been in possession since 1849, but had no other title. In 1861 W. S. released to his daughter G., who was not proved to have ever taken possession, and in 1867 G. and W. S. conveyed to the defendant. In 1863, W. S. being in possession signed an agreement, set out below, to purchase the land from the plaintiff.

*Held*, that this, being an acknowledgment of the plaintiff's title by the person in possession, took the case out of the statute, and entitled the plaintiff to succeed.

THIS was an action of ejectment, tried before Hagarty, C. J. C. P., at Cobourg at the Fall Assizes in 1871, to recover possession of part of lot 14 in the 3rd concession of the township of Hamilton, mentioned in a certain quit claim from William Solomon to the defendant, dated 12th September, 1866. The defendant claimed title by possession, and a verdict was, entered for the defendant, with leave to move to enter a verdict for the plaintiff.

It is not necessary to notice all the evidence given in reference to this action. The other questions raised in the case were similar to points raised in four other actions brought by this plaintiff, and so far depended on the result of these cases, they will be found reported in 22 C. P. 551. The judgments were given in favour of the defendants in both courts. In this case, however, besides these points, on the part of the defence an acknowledgment of title was relied on as defeating defendant's title by possession. And additional facts were given in the evidence at the trial of this cause. It appeared that the land now in question was sold by Josiah White to one William Solomon, in 1855, White having no title: that on 5th January, 1861, Solomon released his interest to his daughter Gertrude, and on the 24th November, 1867, Solomon and Gertrude conveyed to defendant (also a daughter) the premises in question: that the defendant did not enter on the land in question until after she got this deed. One John Cook testified that William Solomon had no house on the land:



that he lived on the adjoining lot 13: that he, Solomon, cultivated the land: that he left the place in the fall of 1866: that up to the time he left, he used and cultivated the land as he had previously done: that the witness saw no difference in his use of it: that his daughter Gertrude lived with him, and also left the place with him.

On the part of the plaintiff was also proved an offer for the land, without date, signed by Solomon, as follows:

"I will pay for the 30 acres I have of 14 in the 3rd Hamilton, \$10 an acre, \$25 down; \$100 1st January, 1864 and the balance in two equal annual instalments, or if I get Whittaker's land will pay for his nine, \$9 per acre after the same manner.

WILLIAM SOLOMON."

Also an agreement signed by Solomon, agreeing to purchase, dated 21st September, 1863, as follows:

"I, William Solomon, have agreed to purchase the triangular piece of lot No. 14 in the 3rd concession of Hamilton, from Mrs. Cahuac, now occupied by myself and Godfrey, between the road across said lot No. 14 and the concession line between the second and third concessions, upon the following terms, viz.: At \$10 an acre for the number of acres in the said triangular piece, which amount is to be paid as follows: \$25 dollars down, the first instalment of \$100 on the first day of March, 1864, and the balance in two equal annual instalments, with interest on the sum remaining due on the payment of each instalment.

WILLIAM SOLOMON."

"Witness:

"W. E. RUTTAN.

"September 21, 1863."

The defendant's counsel objected that this offer and agreement had no effect on defendant's title, as Solomon was at the time a stranger to the title, having previously sold to his daughter. The plaintiff's counsel contended that they constituted an acknowledgment in writing by Solomon, who at the time was the person in possession, and although he had released to his daughter he remained in possession; he had at the time no title, and she derived none. A verdict was entered for the defendant, with leave to the plaintiff to move, &c.

During Michaelmas Term, 1871, *C. S. Patterson*, obtained a rule to set aside the verdict and enter a verdict for the plaintiff, upon several grounds, which it is not necessary to refer to except the following: that the right of entry under the statute dates only from the written offer by Solomon to purchase the land.

During Easter term, June 6, 1876, *J. W. Kerr*, shewed cause. *C. S. Patterson*, supported the rule.

June 30, 1877. MORRISON, J.—This case has inadvertently lain over for some time. It was argued with other cases brought by this plaintiff before the learned Chief Justice of the Supreme Court, then presiding in this Court, and myself, and although judgments were delivered in those cases, this Court following the decisions in two similar cases in the Common Pleas, 22 C. P. 551, all brought to try the title on the part of the plaintiff, this case being somewhat different to the others, stood undisposed of until my attention was recently drawn to it by the plaintiff's counsel.

I find, on examining the learned Chief Justice's notes, who tried the causes, that while the other five cases turned upon the questions of possession, in this case there was evidence given of an acknowledgment of the plaintiff's title, which the counsel contended at the trial and at the argument of this rule, was sufficient to entitle her to a verdict.

The question arising in this suit is, whether the agreement signed by Solomon to purchase the land in September, 1863, was such an acknowledgment in writing as would prevent the operation of the Statute of Limitations; if not, then the defendant is entitled to hold the verdict.

It was contended by defendant's counsel that that offer or agreement to purchase could have no effect against this defendant's right to possession.

It seems to me, however, that the plaintiff is entitled to succeed. William Solomon went into possession, and claiming possession through Josiah White, who had no title but what possession gave him. His possession commenced in 1849, and if his possession and the possession of those claim-

ing through him continued without interruption until the bringing of this action twenty years had elapsed, and the plaintiff would, as in the other cases, fail; but the plaintiff contends that Solomon, while being in possession acknowledged the plaintiff's title in 1863, and that her right of entry then accrued.

Now the facts proved are, that Josiah White, having no title, sold to Solomon in 1855: in 1861 Solomon released to his daughter Gertrude, and in November, 1867, Gertrude and Solomon conveyed to the defendant. Now prior to 1867, this defendant was not in possession. Solomon lived on the next lot and cultivated this land from 1856, until he left the place in 1867, when the defendant went into possession. There is no evidence that Gertrude was in possession of the land. The only evidence as to her was, that she lived with her father: that in 1863, he Solomon, being then in possession, signed the agreement to purchase the land from the plaintiff for \$10 an acre. Gertrude then had no title at that time. She certainly was not in visible possession of the land, and there is no evidence that she cultivated the land or occupied it in any way, while there is evidence that Solomon was in possession prior to 1863, and cultivated the land and continued the same possession and cultivation until he left the place in 1867, when the defendant went into possession.

It appears to me that the agreement to purchase of September, 1863, was an acknowledgment of the plaintiff's title to the land, within the meaning of the statute, and that it was made by Solomon, then in possession of the land, and that being so the plaintiff's right of entry accrued at the time of such acknowledgment. An acknowledgment of title in writing makes the possession of the person making the acknowledgment the possession of the person to whom it is made: *Sugden's Treatise on the New Statutes*, 2nd ed., 67, 80. I refer to *Incorporated Society, &c. v. Richards*, 1 Dr. & War. 258; *Doe Boulton v. Walker*, 8 U. C. R. 571; *Drake v. North*, 14 U. C. R. 476; *Penlington v. Brownlee*, 28 U. C. R. 189.

The rule will be absolute to enter a verdict for the plaintiff.

HARRISON, C. J., and WILSON, J., were not present at the argument, and took no part in the judgment.

*Rule absolute.*

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FITZGERALD ET AL. V. JOHNSTON ET AL.

*Chattel mortgage—Description of goods.*

A chattel mortgage described the goods as, "all the goods, chattels, furniture and household stuff whatsoever, the property of the said mortgagor, situate and being in and upon the hotel, stables and premises known as Strong's Hotel, in the said city of London; which said goods and chattels, furniture and household stuff, are more particularly, but without restriction to the above description, described and set out in the schedule hereto annexed marked A; that is to say, any goods and chattels, furniture and household stuff, in and upon the said hotel, stables and premises, not included in the said schedule are not to be excluded from this security."

In the schedule was contained: "Yard and stables, 1 omnibus, 2 bay horses, aged \* \* the whole of this above named property, goods and chattels, household furniture, horses and waggons, now being in and upon the premises known as Strong's hotel," on, &c.

At the time of giving the mortgage the mortgagor owned only two horses for the use of the omnibus, one of which was not a bay horse. *Held*, that this horse would not pass by the description in the schedule, but that it passed by the general words in the mortgage as being in and upon the stables; and premises and that the omnibus clearly passed.

SPECIAL CASE.—Appeal from the judgment of Galt, J.

The question was, whether the description of the goods and chattels in a mortgage was sufficient to pass the property.

The conveyance was of "all and singular the goods, furniture, and household stuff hereinafter particularly mentioned and described, that is to say: all the goods, chattels, furniture, and household stuff whatsoever the property of the said party of the first part, situate and being in and upon the hotel, stables, and premises known as Strong's Hotel, in the said city of London, which said goods and chattels, furniture and household stuff, are more particularly,



but without restriction to the above description, described and set out in the schedule hereto annexed marked "A"—that is to say, any goods and chattels, furniture, and household stuff in and upon the said hotel, stables, and premises not included in the said schedule, are not to be excluded from the security."

The goods in question were an omnibus and a horse.

The schedule described the furniture and articles in the different rooms as in dining room and pantry, room No. 1, &c., and it concluded: "Yard and stables, 1 omnibus, 2 bay horses, aged, \* \* the whole of the above named property, goods and chattels, household furniture, horses and waggons, now being in and upon the premises known as Strong's Hotel, on the north side of Dundas street, in the city of London, and occupied by the said William Hawthorn."

The case states that the said goods in dispute were intended by the parties to the mortgage to be covered by it, and as the case formerly stood it continued: "but the said horse and sleigh omnibus are not particularly mentioned in the said schedule mortgage annexed, nor were the defendants in fact aware of the said intention, and had no means of ascertaining the intention of the said parties, otherwise than by the words of the said mortgage or schedule." That passage was in the case when the argument took place before Galt, J.

On the argument before the full Court it was struck out, and the following substituted for it:—

"At the time of giving the mortgage there was only one omnibus belonging to the mortgagor, used in summer with wheels and in winter on runners. It is also agreed that at the same time the mortgagor owned only two horses for the use of the omnibus, one of which was not a bay horse."

February 9, 1877, the demurrer was argued by *R. M. Meredith*, for the plaintiff; and *J. H. Ferguson*, for the defendant.

The argument was similar to that on the rehearing, p. 442.

May '10, 1877. GALT, J.—The words of the statute on which the decision of the case turns, are section 6. “All the instruments mentioned in this Act, whether for the sale or mortgage of goods and chattels, shall contain such sufficient and full description thereof that the same may be thereby readily and easily known and distinguished.”

In the very full and able discussion of this case by the learned counsel, all the cases referring to this much vexed question were cited and commented on. It is unnecessary to quote them, as they will be found collected in *R. & J.'s Digest*, under title “Bills of Sale.”

The point relied on by Mr. Meredith was, that the generality of the words, together with the locality, was sufficient to pass these articles.

On the other hand Mr. Ferguson contended that the words in the body of the mortgage itself would not, without reference to the schedule, include either the horse or the omnibus, and in this opinion I concur. I think that any person reading the words “all the goods, chattels, furniture, and household stuff whatsoever, situate and being in and upon the hotel, stable, and premises known as Strong's Hotel,” would consider that they applied only to household furniture. It is quite true that in the eye of the law horses are chattels, but the expression goods and chattels, furniture and household stuff, could not by any reasonable intendment be held to include horses or other animals.

If then this were all, I should have no doubt in deciding in favour of the defendant, but there is reference made to a more particular description, given in a schedule attached to the mortgage, the terms of which I have already set out.

After the best consideration which I have been able to give to this subject, the conclusion at which I have arrived is this—that the articles mentioned in the schedule will pass, and that no other will pass, except they come within the description of household furniture.

Acting on this view, I am of opinion that, as it is admitted the horse and omnibus now in question are not particularly mentioned in the schedule, [the property in them did not pass under the mortgage, and therefore the verdict must be for the defendant.]

From this judgment the plaintiff appealed, and during this term, June 1, 1877, *Meredith*, for the plaintiff, the appellant, referred to *Mason v. MacDonald*, 25 C. P.

435; *Mills v. King*, 14 C. P. 223; *Powell v. Bank of Upper Canada*, 11 C. P. 303; *Harris v. The Commercial Bank*, 16 U. C. R. 437, 444; *Ross v. Conger*, 14 U. C. R. 525; *Rose v. Scott*, 17 U. C. R. 385.

*J. H. Ferguson* contra, cited *Kingston v. Chapman*, 9 C. P. 130; *Re Thirkell*, *Perrin v. Wood*, 21 Grant 492; *Fraser v. Bank of Toronto*, 19 U. C. R. 381; *Mathers v. Lynch*, 28 U. C. R. 354; *Haworth v. Fletcher*, 20 U. C. R. 278.

*Meredith* cited also, in reply, *Patterson v. Maughan*, 39 U. C. R. 371; *England v. Downs*, 9 L. J. Ch. 313, 1 Beav. 96; *Noell v. Pell*, 7 U. C. L. J. 322; *Heward v. Mitchell*, 10 U. C. R. 535.

June 30, 1877. WILSON, J.—The statement which has been struck out of the case, and which induced Mr. Justice Galt to say “that as it is admitted the horse and omnibus are not particularly mentioned in the schedule, the property in them did not pass,” presents the case to us relieved from that difficulty. We have now to look at the mortgage and schedule themselves, and not at the statements of the parties, to determine what construction to put upon them.

One omnibus, described in the schedule as part of the goods which are in the yard and stable of Strong’s Hotel on the north side of Dundas street, in the city of London, and the mortgage referring to all the goods and chattels which are described in that schedule as being specially the articles which were conveyed, is a sufficient description of that article.

Then as to the horse in question. It is not a bay horse, and it is therefore not accurately covered by the description in the schedule, “two bay horses, aged.”

It was stated on the argument that there had been a former mortgage, and at that time the mortgagor had two bay horses. One of the horses died, and another was bought in its stead, but it was not a bay horse. When the present mortgage was given, and the former one was cancelled, the parties used the same schedule, or copied the same descrip-

tion of the articles which had been given in the former schedule, and attached it to the new mortgage, and so it happened that there was not when that mortgage was given two bay horses, although there were two horses, one of them being a bay and the other not a bay.

I am of opinion that the description, in the schedule, of two bay horses does not pass along with the one which is a bay the other which is not a bay. It is not the animal conveyed.

If one were indicted for stealing a black horse, when it was a white horse, he would be acquitted unless an amendment were made, for although it was quite unnecessary to describe the colour of the horse, yet as the colour was made a part of the description of the animal, and a means of its identity, it became essential to prove it: *Arch. Criminal Pleading*, 18th ed., 213.

If the description had been "the two bay horses which I use for my omnibus," the *falsa demonstratio* as to colour might be rejected.

The fact that the schedule describes the two bay horses under the heading "yard and stable," does not pass the two horses there, whatever their colour may be.

The next question is, if the horse which was not a bay horse does not pass by the description in the schedule, does it pass by the mortgage itself, which, besides describing the property conveyed "as more particularly, *but without restriction to the above description*, described and set out in the schedule hereto annexed marked A," has this further statement: "*That is to say, any goods and chattels, furniture and household stuff in and upon the said hotel, stables and premises not included in the said schedule, are not to be excluded from this security*"?

The horse in dispute was certainly by the general description contained in the mortgage, included under the terms "all the *goods and chattels*," although these words are coupled with *furniture and household stuff*; and more especially must it be so when the mortgage makes reference to the schedule, as shewing to some extent, although not



conclusively, what goods, chattels, furniture, and household stuff are mentioned and intended to be conveyed, and in it are found the "2 bay horses, aged," as a part of such property.

Now the mortgage conveys "all the goods and chattels &c., the property of the mortgagor, situate and being in and upon the hotel, stables and premises known as Strong's Hotel, in the city of London," although the articles are not included in the schedule.

Does the horse, which is not included in the schedule, pass by the mortgage as an animal which was at the time of the making of the mortgage "in and upon the stables and premises," which along with the hotel were known as Strong's Hotel? It would be a good grant at the common law: *Shep. Touch.* 98. And I think, according to the authorities, it is a good grant under our statute. It is a grant of all the mortgagor's goods "upon these premises," most of which are particularly described, although the horse, which is not a bay horse, is not otherwise described than as a bay horse.

I may refer as to the effect of locality to *Rose v. Scott*, 17 U. C. R. 385; *Mason v. MacDonald*, 25 C. P. 435; *Wilson v. Kerr*, 18 U. C. R. 470; *Fraser v. Bank of Toronto*, 19 U. C. R. 381; *Powell v. Bank of Upper Canada*, 11 C. P. 303; *Ross v. Conger*, 14 U. C. R. 525; *Re Thirkell—Perrin v. Wood*, 21 Grant 492; *Patterson v. Maughan*, 39 U. C. R. 371.

In my opinion the omnibus and horse are sufficiently described by the mortgage, and judgment should be entered for the same for the plaintiffs, with \$1 damages, and full costs of suit.

HARRISON, C. J., and MORRISON, J., concurred.

*Judgment accordingly.*

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## STUART V. BALDWIN.

*Will—Construction—Power to sell—Ore severed from the land—Law of Quebec—Effect of upon the rights to such ore—Case stated under Imp. Stat. 22 & 23 Vic. c. 63—“Bonâ fide possessor” of land.*

Replevin for iron ore taken from land in the province of Quebec. It appeared that R., the patentee of the land, by his will, made in 1829, authorized his executors to sell and convey all his estate, real and personal, for such considerations, upon such terms, and in such manner as they might judge best, and bequeathed the proceeds to different persons. Four executors were named, of whom only two proved the will, and the last of these two died in 1861. Administration with the will annexed was granted on the 20th of May, 1873, to E. S., who conveyed to the plaintiff on the 31st of May.

*Held*, that under 36 Vic. ch. 20, sec. 40, O., E. S. clearly had power to sell to the plaintiff.

Before the execution of this deed the ore in question had been severed from the land, but the deed purported to convey not only the land, but all iron and other ores which might have been at any time severed from the land. *Held*, that the ores passed by this conveyance: for though a chattel, and the conveyance would not, except in equity, pass the legal title to it, yet the heir in whom it was vested would be a trustee for the administrator, the donee of the power, and it might be presumed that such donee, as *cestui que trust*, had authority from the heir as trustee to dispose of it.

The land was situate in the province of Quebec, and a case was sent, under the Imperial Statute 22 & 23 Vic. ch. 63, for the opinion of the Court of Queen's Bench there. That Court decided, thereupon, that the deed by the administrator passed the land and ores to the plaintiff: that defendant had no title sufficient to defeat it: that a certain judgment, set out in the case, recovered by the defendant against the plaintiff there, had no effect upon the plaintiff's title; and that the plaintiff by their law could maintain an action for both the land and the ore, before the ore was removed from that province, but not for the ore until the title, if in dispute, had been established by a petitory action to which the action for the ore would be incident. *Held*, that the inability to sue for the ore there, except as incidental to the right to the land or after it had been determined, formed no reason why our Court here should not adjudicate with respect to the ore.

Remarks as to the meaning of the term *bonâ fide* possessor of land; and *Quære*, whether the defendant could claim to be so.

REPLEVIN for iron ore.

Pleas, *non detinet*, and goods not plaintiff's.

Issue.

The cause was tried at the Fall Assizes, at Ottawa, 1875, before Patterson, J., without a jury.

The ore was taken from lots 12 and 13, in the 6th range of the township of Hull, in the Province of Quebec.

The patent of the same with other lands was made to Robert Randall, dated the 21st of September, 1807, in fee.

The will of Robert Randall, dated the 2nd of March, 1829, was produced, and the codicil dated the 1st of May, 1834; and the probate of the will and codicil granted in the Probate Court of Ontario, on the 7th of June, 1834, to William Lyon McKenzie and Thomas Horner, two of the four executors named in the will.

There was power given to the executors or the majority of them, or the survivor, to sell real estate; proceeds bequeathed—residue to be apportioned, &c.

There was also produced letters of administration with the will and codicil annexed, granted on the 20th of May, 1873, to Edwin Smith; and a deed from Edwin Smith to the plaintiff of the land in question, with other land, in fee, dated the 31st of May, 1873. The deed expressly assigned ores and timber detached.

The plaintiff, on the 4th of June, 1873, served a written demand on the defendant for the ores taken from the land, and he told him not to remove them.

The ore in question in this cause was that which was shipped on the barges "Delta" and "Thistle," on the 5th of June, 1873, and on the barge Shamrock on the day after.

The ore was put on board the schooner "Clara Youell," and the ore was taken while the schooner was in the Welland canal, with it on board.

A great deal of evidence was given by the plaintiff to prove the handwriting of Robert Randall, so as to establish the will and codicil; and a great deal of evidence to shew that the ore claimed came from the lands before mentioned, or from what was called "The Baldwin Mine," as distinguished from "The Forsyth Mine," which was on other lands, and which latter mine the defendant did own. The plaintiff gave \$12,500 for the lands; he had paid \$750, and the land was mortgaged for the purchase money. He knew when he bought that the defendant was in possession of the land, and that he had opened the mine, and had expended money in doing that.

The penalty of the bond, on which the administration was issued to Edwin Smith, is only \$5000.

At the close of the plaintiff's case, the defendant's counsel moved for a nonsuit, because he contended that more evidence should have been given, to make a case to be stated for the opinion of a Court in the Province of Quebec, under the Imperial Statute 22 & 23 Vic. ch. 63; and to shew what the law of the Province of Quebec was and is, and whether it was different from the law of Ontario; 2. Because it was not shewn the patentee, Robert Randall, was the same Robert Randall who made the will and codicil; 3. Because the power under the will had not been properly exercised—the administrator, with the will and codicil annexed, Edwin Smith, could not under the 36 Vic. ch. 20, O., convey lands under the will and codicil, even in Ontario; but at all events he could not convey lands in Quebec, for the statute could not regulate the conveyance of lands in Quebec; nor could it have any force beyond the limits of the Province of Ontario; 4. Because the letters of administration were improperly issued; for the reason, among others, that the will proved not to have been produced in the Surrogate Court, and there was, therefore, no proper proof of the will; and, 5. Because the ore seized had not been identified as any part of the ore taken from the lands already mentioned.

The first objection was overruled, because it might be assumed, at that stage of the cause, that the law was the same as to the matters in this suit in Quebec as it was in Ontario.

It was also stated that the trial was had on an understanding between the parties, that it was merely to find facts for the opinion of the Court in Quebec upon them, under the Imperial Statute. The other objections were merely noted and not ruled upon.

The defence was as follows, so far as it is material. The defendant was called. He stated: I have been in possession of the lots since the fall of 1871; from the date of the deeds, whatever date that is, I paid for the



lands, \$20,000 for 25 acres for the mine; and \$5 an acre for the mountain land, 149½ acres. The land was only valuable for mining purposes. Since purchasing, I have expended in opening up the mine, and before I began to mine, from \$5,000 to \$8,000. No one objected or disturbed me until the ore was seized at the dock, and the cargo in question was seized. The ore at the dock was seized under process from the Quebec Courts. The notice I received four or five days before the seizure, was the first intimation of objection I had. I brought an action against the plaintiff for the seizure of the ore at the Gatineau, in the Superior Court of the District of Ottawa, in the Province of Quebec. I produce a notarial copy of a deed to me from Charles Pink, Alexander Pink, and Robert Pink, dated the 22nd of November, 1871, covering the mine in question; I now remember that I was in possession the fall before I got the deed, as I had six months to examine the property; I know of my own knowledge that the Pinks had been in possession of the property ever since the winter of 1854-1855.

*Cross-examination.*—The purchase was made in 1870; the deed was made in 1871; I know all about the Pinks' title, and that it was a title only by possession; I had copies of the Randall deed and other deeds from the registry office; these lots and others were usually called the Randall lots; I could not say that the lots were generally mentioned in the neighbourhood by the name of the Randall property; I did not know the Pinks were in possession as representing the Randall estate; I never heard of that till after the present dispute; there were no improvements on the land, but the timber was cut off; I considered the title was good, or I would not have paid the amount of money I did; I had from ten to twelve men at work before I got any ore.

*Alfred Driscoll*, a prothonotary of the Superior Court of Quebec, residing at Aylmer, produced an exemplification of a record of that Court in the case of *Baldwin v. Stuart*.

This was produced as a judgment in rem respecting these lands.

In reply, *Jane Dawson*, said:—I am a daughter of the late Robert Bannister of Hull. I live on part of what is called "The Randall Estate"; I believe the plaintiff brought an action to dispossess me.

*James Wadsworth*, said:—I am a justice of the peace in the county of Ottawa; I live in the township of Hull; I know Robert Bannister; I have seen him write; I could not swear positively to the letter produced, but I think it is his signature; I should think the signature to a lease from Humphrey Culp to one Pink in 1847, now produced, is Bannister's writing; I knew Samuel Pink; I know Charles Pink's writing better than Samuel's; I cannot give an opinion as to the signature of Samuel Pink on the lease; Bannister and I went to the Chats frequently together lumbering; I recognize my own signature to a summons produced, obtained by Ruggles Wright against Samuel Pink on 21st February, 1850; as far as I remember Wright and Pink arranged between themselves; I should say the letter of the 19th February, 1850, is in Charles Pinks writing, addressed to I. H. Culp, Drummondville; it is signed Samuel Pink; if it is any of the Pinks it is Charles's; it is not Samuel's; the letter of 8th March, 1850, signed Samuel Pink, looks like the writing of Charles, and so does the letter of 17th December, 1852.

*Cross-examination.*—Charles and Samuel Pink were brothers; I cannot say if Samuel was in possession of the lands in question; I know he was living about the mines; Charles was a schoolmaster; I think he lived in Hull; I lived in Aylmer, nine miles above; I think Charles and Samuel are both dead, they would be full as old as I am, say 70 years old, or even perhaps 80 if living now; their families were grown up when they died; Samuel must be dead five or six years; I don't remember whether he or Charles died first; I knew Bannister very well; I could not after so long a time swear positively as to his signature.

*Re-examination.*—Some lots in Hull of mining property

have been known to the old residents in my time as the Randall property ; I do not know what property it was or whether Pink lived on it ; I heard Bannister say he was an agent for the Randall estate ; some mining property was claimed by the Wrights.

An exemplification signed in 1859 by Charles Fitzgibbon, surrogate clerk, of letters of administration, issued in 1844 to Isaac Humphrey Culp, of the estate of Robert Randall, was put in, and objected to as not legal evidence of the administration.

*Daniel Pink*, said :—I am a son of the late Charles Pink ; Samuel was my uncle ; Samuel lived on the property called the Randall property ; he is dead 20 or 21 years ; I never heard him say he was agent, nor that he had obtained a lease from any one to cut timber on it ; I know that his son did cut logs on the property.

*Cross-examination.*—Charles, Alexander and Robert are my cousins and sons of Samuel ; some years ago they lived in possession of the land where the mine is ; they had lived there over twenty years to my knowledge, from their father's death till they made the deed to defendant ; my father died about seven years ago.

*John Currie* said :—I knew the late Samuel Pink ; I was a connection of his ; I also knew Robert Bannister ; I never heard any conversation between Samuel Pink and Bannister about a lease ; I have heard some of his sons say that they held the property under a lease from Mr. Culp ; Samuel Pink was not present when the sons spoke of the lease ; it was William Henry who spoke of it.

*Samuel Pink* said :—I am a son of Charles Pink and nephew of Samuel ; as far as I know he went on to it ; I never heard him say he went on under a lease, and I never heard it in his family ; I never saw him write since I was a little boy.

*Timothy Moffatt* said :—I knew the late Samuel Pink and Charles Pink ; I knew their writing, but it is a long time out of my memory ; in my opinion the signature to the lease is like his hand-writing ; the letter 17th Decem-

ber, 1852, resembles Charles Pink's hand-writing, and so does that of 19th February, 1850; I have no doubt this is the hand-writing of Charles, but I am not sure; as to Samuel's name on the lease I certainly have a doubt as to its being his, though it resembles it; I helped Samuel Pink in 1840 to underbrush some land; he told me that he was in possession, but I do not remember what he told me; the property I understood to be called the Randall estate; Samuel mentioned once to my mother in my presence that he had a lease of the place; I do not remember that he said from whom he had it; I heard in the neighbourhood it was from Mr. Culp; I think Samuel Pink has been dead 25 years; he was a mechanic, and did not do much writing; when I was a boy he used sometimes to take a pen and write in my copy book; he did speak of a lease, I think in my mind it was about the Randall property; it was in 1849 or 1850.

*Emanuel Redmain* said:—I knew Samuel Pink; he bought from me part of lot 13 in the 5th range, which adjoins 13 in the 6th range; he built his house on what he bought from me.

*Cross-examination.*—I think it was in 1839–1840 or 1841 I first knew Pink to be in possession; I do not remember the building of any house till of late years; there was some underbrushing done in 1841; the Pinks have been in possession ever since, using the place as their own, as I believe, cutting timber, &c., until they sold to defendant.

*Re-examination:* Since Samuel Pink's death, his sons have built a house and barn on the land; some of the young Pinks lived on it; forty or fifty acres of lot No. 13 have been cleared and cultivated; I do not know in what way they had possession of the rest of the lot; I supposed they held it all; I know the Pinks cut timber all over the land wherever they wanted.

*John Currie*, re-called, said: The house and barn are on lot No. 12, near the north line; 13 is west of 12.

*Cross-examination:* The Pinks cut timber over both lots for a number of years, and I have bought wood from



them, and so did others; the wood I bought was on lot 12, close to the new mine; there was no clearing where the mine is till within ten years ago.

*Re-examination.*—I bought the wood and asked no questions as to their right to the timber; the property was called the Randall property.

*Re-cross-examination.*—I never heard any but 600 acres (11 in the 5th range and 12 and 13 in the 6th range) called the Randall property.

*James Walker* said—I knew Samuel Pink; after his death I dealt with his sons; I bought some white pine timber on 400 acres of land they claimed to have there; it was the property I have heard called the Randall property; they sold me the timber as if it were their own property; they said nothing of a lease, or of being agents; they sold to me as if they were owners; it was in February, 1855.

*Cross-examination.*—I had seen the family in possession of the property for forty-five years; both before and since they sold to me I knew of them selling timber off the land, which was cut and taken to market.

*Charles Flynn* said: I live in the township of Eardley; I own land in Hull; I was brought up in Hull about a mile from this land; I never heard the property called any particular name; I knew Samuel Pink; I went on the land once, and was chopping and improving; I had been working some four or five days when Samuel Pink told me not to chop any more on it, as he was in charge of it and would not allow it; that was about twenty-seven years ago.

*Cross-examination:* I think I can be positive he used the words "charge of the place"; I gave up at once.

*Joseph Badan* and *Charles B. Wright* said: They lived in Hull; that the property was called "The Randall Property." Wright, on cross-examination, said there was a good deal of the property there called "The Wright Property."

*Alfred Driscoll* said: I am clerk of the Circuit Court; I produce an original record and copy of judgment in a case of William H. Pink against Roger Sparks, in the Circuit

Court, of which I am clerk; the action was to obtain possession of lot 12 in the 6th range of Hull, in which action the plaintiff in that case failed. As prothonotary I produce a copy of judgment in the case of William Lyon McKenzie against William H. Pink, finding that the plaintiff in that case failed to establish his title as the executor of Randall, and the action was dismissed; costs were taxed to the defendant in that suit, and execution issued, a copy of which I produce, against the goods and chattels, lands, and tenements of the plaintiff in that suit; I look at an advertisement in the *Gazette* of the 30th October, 1860, which seems to be a sheriff's advertisement on this execution, and advertising these lands for sale; the sheriff's return is that on behalf of McKenzie the debt and costs were paid to Pink's attorney.

*Cross-Examination:* The judgment was in favour of Peter Ayler, the attorney, for Pink, and not in favour of Pink for the costs; the attorney gets judgment by way of distraction.

*Augustus Keefer* said: Mr. Culp, who has been mentioned, lived at Niagara Falls, and married, as I understood, a daughter or granddaughter of Randall; after McKenzie left the country, Culp came down here and represented that he had taken out administration, with will annexed, to Randall's estate; and he put Bannister in charge of the lands, and gave me a power of attorney as to these and other lands to take charge of and sell, lease, &c., on instructions from him; it is dated on 2nd of November, 1848, and I now produce it; previous to that, in July, 1847, there was a license of occupation to Bannister, which I now hold, and under it Bannister was in possession; I knew nothing of any lease to Pink; I have an indistinct recollection of seeing Pink, but no recollection of seeing him in connection with these lands.

*Cross-examination:* The power of attorney does not describe Culp as administrator; I had a letter of Culp saying that he had given up the lands to McKenzie on the latter's return to this country; it is dated on the 8th of

July, 1850; I produce it; another is dated June, 1850, saying he has surrendered his administration to McKenzie and reported to the Court, but had not transferred the deed of the iron mine, &c.; I left here in 1850.

*Re-examination*: I never heard before I left here of any one claiming adverse possession of the lands.

*John Stuart*, re-called, said: The letters of the Pinks which I have produced I received thus; the letters of the 19th of February, 1850, and 8th of March, 1850, I received from Mr. Delisle, who was the attorney of McKenzie in his unsuccessful action against Wm. H. Pink; that of the 17th of December, 1862, I received from Mr. Lindsay, of Toronto, son-in-law to McKenzie, and from whom I received some other papers; I received the lease and the patent also from Mr. Delisle.

At the close of the evidence *O'Connor*, Q. C., for the plaintiff, argued that the plaintiff had established a legal title to the land in question under the patent to Randall, and the will made by him, and the due execution of the powers of the will by Edwin Smith, the administrator with the will annexed; and that he had also shewn that the ore, which was claimed, was taken from the land; that the question of possession set up by the defendant must be decided by the Court of Law in Quebec, to which the case might be referred under the statute; that it appeared that Samuel Pink had a lease from a person representing Randall's estate of a portion of the land, with the liberty to cut timber on the rest of it; and that neither he nor any of his sons ever claimed to hold otherwise than as agents or lessees.

*Cockburn*, Q. C., for the defendant, contended that the plaintiff's title had not been made out; that a case must be stated for the Quebec Court, and the opinion of that Court given upon the law of Quebec, before the cause could be decided; that Court must determine the important questions whether the evidence of possession upon which the defendant relied of Pink and of himself was or was not

a possession in good faith; and whether Pink held or not adversely to the Randall estate title. He denied also that the identity of the testator with that of the patentee had been established, and that the ore in question was proved to have been taken from the land in question.

The learned Judge found the facts as follow :—

By patent, dated 21st September, 1807, the Crown granted to Robert Randall, his heirs and assigns forever, in free and common soccage, six hundred acres of land in the township of Hull, being lot No. 11 in the 5th range, and lots 12 and 13 in the 6th range, of that township.

2. The ore in question was taken from lot 13, in the 6th range.

3. Robert Randall made a will, in Upper Canada, where he had his domicile, on 2nd March, 1829, duly executed so as to pass both real and personal estate situated in the Province of Upper Canada, being signed by the hand of the testator in presence of three witnesses, who attested the same by signing their names thereto in the presence of the testator, and in the presence of each other, by which, *inter alia*, he appointed William Lyon MacKenzie, Thomas Hornor, and two others, his executors, and authorized them, or a majority of them, or the survivor or the survivors of them, to sell or convey, by deed or otherwise, all his estate, real or personal, for such consideration, upon such terms, and in such manner as they might judge best; and, from money, to be received from debts collected, or from sales of property, he bequeathed two specific legacies; and directed the remainder of his estate, if any, to be divided into ten equal parts, which he bequeathed in separate shares among a number of persons, including his daughter Levinia Culp, the wife of Isaac Culp, of Stamford, one Edwin Smith, and William L. MacKenzie and Thomas Hornor; and he also made a codicil, on the 1st May 1834, not affecting his Lower Canada lands.

4. Robert Randall died before 7th June, 1834, and, on the last mentioned date the will and codicil were proved in the Probate Court of Upper Canada, by William L. MacKenzie and Thomas Hornor. The probate was registered in the county of Ottawa, in Lower Canada, on 8th January, 1836. On 20th May, 1873, all the executors named in the will being dead, letters of administration, *cum testamento annexo*, were granted by the Surrogate Court of the county of Welland—which was the Court having jurisdiction so to do—to the same Edwin Smith, who was residuary devisee under the will, the administrator giving a bond, an exemplification of which is put in.

5. By the law of Upper Canada, and of Ontario, the executors,



appointed by the will of Robert Randall had power to sell and convey all the real and personal estate of the testator in that Province, and, by an Act of the Legislature of Ontario, passed in the year 1869 (33 Vic. ch. 18), the said Edwin Smith, as administrator, *cum testamento annexo*, had power to convey the real estate, as well as the personal estate, of the testator, and any estate or interest therein, in as full, large, and ample a manner as the executors might have done.

6. Until the passing of the said Act an administrator had no power, in the said Province, to sell freehold lands of a testator or intestate, but had full power of disposition over the personal estate. On the 31st of May, 1873, Edwin Smith, the administrator, made a deed to the plaintiff, conveying to him lots 12 and 13 in the 6th range, and assigning, also, all timber and ores which had been detached or severed from the land. The consideration money for the purchase is \$12,500, which the plaintiff secured to Smith by mortgage on the land, and of which he has paid about \$500.

7. In the winter of 1872-3, the defendant took from lot 13 a large quantity of iron ore, which, during that winter, had been drawn away from the lot, and piled at a distance from the lot, on the bank of the river Gatineau, in the Province of Quebec, where it lay when the deed from Smith to the plaintiff was made.

8. On 4th June, 1873, the plaintiff served defendant with a notice (which is put in), and demanded the ore; shortly after which a portion of the ore—being about 420 tons—was removed by the defendant into the Province of Ontario, and was seized by the plaintiff, in that Province, under a writ of replevin.

9. That ore forms the subject of this suit.

10. The plaintiff has no title to the ore other than the title, if any, conveyed to him by the deed from Edwin Smith.

11. The defendant claims to be entitled to the lands and ore in question, and he has the title, if any, shewn by the following statement of facts, and no other title:

12. In 1847, Thomas Hornor, one of Randall's executors, being dead, and William L. MacKenzie, the other executor who had taken probate, being out of the Province of Canada, Isaac Humphrey Culp—the same person mentioned in the will as Isaac Culp—acted in exercising a general oversight over the estate of Randall. It is not shewn that Culp had any interest or authority other than what belonged to him as the husband of one of the residuary devisees, except that administration was granted to him, *cum testamento annexo*, but expressly limited to the purpose of enabling him to be a party to, and to prosecute, some proceedings in Chancery; and this administration he surrendered on the return of Mr. MacKenzie to Canada, in 1850.

13. In 1847, one Samuel Pink was, and had been for some time, in occupation of about twenty-five acres of improved land on the southwest angle of lot 13, and one Robert Bannister was also in occupation of some part of lot 11 in the 5th range, and of lots 12 and 13 in the 6th range.

14. On the 29th July, 1847, Culp gave to Bannister a deed giving him license to occupy the three lots, at one shilling per lot per annum, especially stipulating that Bannister should not cut timber on the lots, and that he should give notice of any trespass on the lots to Augustus Keefer, the agent of Culp; and, on 13th August, 1847, Culp, with the assent of Bannister, made a deed to Samuel Pink, granting to Pink license to occupy the southwest corner of lot 13—which he had theretofore occupied—and giving him leave to cut timber (not saying from what land) only for the purpose of fencing and enclosing the leased premises; Pink<sup>r</sup> to surrender possession at any time, on receiving six months' notice, and to pay fifty shillings a year.

15. In 1848 Culp gave a power of attorney to Augustus Keefer to do certain acts, including the prevention of trespass on the lands in question.

16. Samuel Pink corresponded with Culp about the lands, informing him of trespasses upon them, until 1850, when Culp handed over the management to William L. MacKenzie, and the latter, who lived in Toronto, assumed the care of the Randall estate, including the lands in question.

17. On the 17th December, 1852, Samuel Pink addressed to William L. MacKenzie a letter, promising, in reply to a letter received by him from MacKenzie, to take charge of lots 12 and 13, but declining to take charge of the lot occupied by Robert Bannister, because, he says, there was no timber on it worthy of notice, and he asked from Mr. MacKenzie the privilege of cutting a few saw-logs on the lot which he occupied, for a few boards for his own use.

18. Samuel Pink died in August, 1854, and, in December, 1854, Robert Bannister wrote to William L. MacKenzie respecting threatened trespasses, and informed Mr. MacKenzie that he had warned the parties that Mr. MacKenzie was the only person who had authority to deal with the lands.

19. The letters and documents referred to, with others, are put in as evidence.

20. The letters, written in the name of Samuel Pink, were written in the hand of his brother, Charles Pink, with his authority, and as his *amanuensis*.

21. Up to the death of Samuel Pink, in August, 1854, he had no possession of the lands in question, except that part described

in his license of occupation of 1847, and never claimed any title to any part of the said lands, except the title under the said license ; and, except the part so occupied by the said Samuel Pink, no part of lots 12 and 13 was, up to the death of Samuel Pink, occupied by any one, unless so far as Robert Bannister may have occupied those lots without enclosing or improving them, or cutting timber upon them ; there is no evidence that there was any such actual occupation either by Bannister or any one.

22. Samuel Pink did not live on the land in question, but on adjoining land, which did not form part of the Randall estate.

23. Samuel Pink never disputed the title of the representatives of Randall to the lands in question, or claimed any right or title adverse to them.

24. After the death of Samuel Pink, his children continued to occupy as he had done in his life time, knowing, as I find the facts to be, that their father had and claimed no title except as licensee of the Randall estate, and having themselves no title except what descended to them from their father, or was, after his death, acquired by them by their own possession.

25. After the death of Samuel Pink, his sons cut timber off the lots 12 and 13, and sold timber to others to cut, without the consent of any of the representatives of Robert Randall, and in the same manner as if they had themselves been owners of the lands ; and they also erected buildings on some portions of the land.

26. The lands hereinafter mentioned as conveyed to the defendant were never cleared or improved, and were not included in the corner let to Samuel Pink, nor in the parts of the lot on which the sons of Samuel Pink erected buildings, and were never in the actual possession or occupation of the sons of Samuel Pink, further than as possessed or occupied in the cutting and selling of timber from them.

27. In the fall of 1871, the defendant bargained for the purchase of a part of the said lots 12 and 13, containing the mine from which the ore in question was taken, from Charles Pink, Alexander Pink, and Robert Pink, sons of Samuel Pink, and on the 22nd November, 1871, they made a deed conveying to the defendant their interest in the land, and gave him at that time possession of the land, and the defendant has, ever since he so obtained possession, remained in actual possession and occupation of the land ; the defendant paid for the land upwards of \$20,000, and expended upwards of \$5,000 more in opening the mine and preparing it for being worked, in addition to the expense of working it.

28. The defendant, when he purchased the land, knew of the Randall title, having obtained information thereof from the

Registry office of the county of Ottawa, and he knew of the possession which the sons of Samuel Pink had since the winter of 1854-5.

29. The defendant was not disturbed in his possession and enjoyment of the lands or the mine, until the notice was given to him by the plaintiff in June, 1873.

30. The defendant brought an action against the plaintiff in the Superior Court for the Province of Quebec, in the District of Ottawa, an exemplification of the judgment wherein is put in evidence.

The learned Judge reserved the cause, and postponed the giving of a verdict until a *Case* should be transmitted to one of the Superior Courts of the Province of Quebec for their opinion thereon, according to the statute in that behalf. This case the learned Judge subsequently prepared in accordance with the foregoing findings.

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The following were original documents accompanying this case and forming part thereof:

1. Letters of administration with the will and codicil annexed thereto, of the said Robert Randall.

2. Copy of deed, Edwin Smith to the plaintiff, John Stuart.

3. Deed of Pink and others to the defendant, Alanson H. Baldwin.

4. Exemplification of judgment in the Superior Court of Quebec, for the District of Ottawa, between the said parties.

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Copies of other documents produced and proved at the trial, and forming part of this case :

(1)

I, Isaac Humphrey Culp, of the township of Stamford, in the Niagara District, C.W., do hereby grant license of occupation to Robert Bannister, of the township of Hull, in the county of Ottawa, in the district of Montreal, Lower Canada, to occupy lot No. 11, in the 5th range, and also lots Nos. 12 and 13 in the 6th range, of the said township of Hull, until countermanded by the said Isaac H. Culp or his attorney, at the yearly rent of one shilling per lot from the time he, the said Bannister, took possession; and it is further understood that the said Bannister will not cut any timber on the said lots above mentioned, and if any other person should interfere with the said premises, the said Bannister will forthwith give notice to the said Culp's attorney at Bytown, Mr. Augustus Keefer, of the same.



In witness whereof, I hereunto set my hand and seal, this 29th day of July, 1847.

Signed, sealed and delivered in presence of	}	(Signed)	ISAAC H. CULP.
Witness (Signed) ROBERTSON LYONS.			

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(2)

I, Isaac Humphrey Culp, of the township of Stamford, in the district of Niagara, Canada West, do hereby grant license of occupation to Samuel Pink, of the township of Hull, in the county of Ottawa, to occupy the southwest corner or angle of lot No. 13, in the 6th range of the said township of Hull; the said premises having heretofore been occupied by the said Pink; and the said premises contain on or about the quantity of twenty or twenty-five acres of improved land; and it is further understood that the said Pink has license to cut timber only for the purpose of fencing and enclosing the said premises; and it is also understood that the said Pink will surrender possession of the said premises to the said Culp, or his attorney, at any time hereafter, on giving a notice of six months; and the said Pink agrees to pay an annual rent of forty shillings per annum to the said Culp, or his attorney, the said annual sum to be paid on the first day of August in each and every year during the term of occupation or occupying of the within described lands.

In witness, the parties have hereunto set their hands and seals, this 13th day of August, 1847. Witness,	}	(Signed)	ISAAC H. CULP. [L.S.]
(Signed) ROBERT BANNISTER.			

Received one year's rent on the above agreement.

Township of Hull, Lot No. 11, in the 6th range.

(Signed.) ISAAC H. CULP.

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(3)

Hull, February 19th, 1850.

Sir,—I have to inform you that Mr. Ruggles Wright, Jr., has made timber on the land that I have rented from you. I have taken the trouble to forbid them either to make any more or to take away what they have made. I would wish to know if that Mr. Keefer, your agent, has authority for to sell the timber without either your sanction or mine. Write immediately, and let me know how I am to act, as a few days will take off all the timber.

I am, Sir, yours truly,

(Signed) SAMUEL PINK.

Direct—Samuel Pink, care of Mr. Geo. Marston, Postmaster, Hull, L. Canada.

(4)

District of Montreal. } JAMES WADSWORTH, Esquire, one of Her Majesty's Justices of the Peace in and for the said District, to SAMUEL PINK, of Hull, Farmer.

Whereas information and complaint has been lodged against you :—That, on the twentieth day of February instant, you, together with another person, each armed with a double-barrelled gun, proceeded to Lot No. Twelve, in the Sixth Range of Hull, and then and there unlawfully forbid and prevented certain men there employed, of Ruggles Wright, Jr., from working, and that you further stopped the road made by the said Ruggles Wright, Jr., by felling trees across the same.

These are, therefore, to require and command you to be and appear before me, or some other of Her Majesty's Justices of the Peace in and for the said District, on Friday, the twenty-second instant, at Conroy's Hotel, Aylmer, at the hour of eleven o'clock a m., to answer to the complaint as the law directs.

Dated at Aylmer, this 21st day of February, 1850.

(Signed) JAMES WADSWORTH, J.P.

(5)

To Mr. Culp.

Hull, March 8, 1850.

Sir,—About three weeks ago I wrote to inform you concerning the timber on the land that I have rented from you. I mentioned that Ruggles Wright, jr., was making timber in opposition to repeated notices I gave him. Since that I blocked up the road he had cut, and he then went to Mr. Keefer, your agent, in Bytown, and purchased the timber, on all the lands, at Government price. He then summoned me before the Court at Aylmer, for trying to stop him from making the timber on the land I hold from you. I put Mr. Wright on oath at the Court, and he confessed that he had trespassed on the premises before he had made any arrangement with Mr. Keefer.

I have taken the trouble to inform you of the particulars so that you may take any steps you think the most advisable.

I am, Sir, with respect, yours, &c.,

(Signed), SAML. PINK.

Please write immediately. Direct to Saml. Pink, care of Bytown postmaster.

(6)

Hull, 17th December, 1852.

Sir,—I received your letter dated 3rd December, on the 14th, authorizing me to keep off all trespassers on six hundred acres of

land belonging to the late Mr. Randall. I have to inform you in reply, that I will take charge of 12 and 13 lots, but I should beg to decline taking charge of the lot occupied by Robert Bannister, as I consider there is no timber on it worthy of notice. Should a case of trespass occur, I shall give you immediate notice.

As to Mr. Leamy, who applied for the timber, he is a worthless character, and a man not to be depended upon.

If you would be so good as to allow me the privilege of cutting a few saw-logs, on the lot I occupy, for a few boards for my own use, you would oblige me very much. My best respects to you and your family.

I am, Sir, your obedient servant,

(Signed) SAMUEL PINK.

To W. L. MacKenzie, Esq.

P.S.—If you will have the goodness to answer this as soon as possible, you will oblige me very much.—I am, Sir, yours,

(Signed) S. PINK.

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(7)

Hull, October 5th, 1854.

Mr. Wm. Lyon MacKenzie, M.P.,

Sir,—I have lately been called upon by a person, calling himself McCallum, who is acting as agent for the Hon. Peter McGill, to look after lands in different parts of this country, and, among the rest, an undivided sixth part of the Randall property, which he obtained by a transfer from the late Thomas Mears, of Hawkesbury. Immediately after he left I went to Aylmer and found he had been at the Registry office, with another person that I suppose to be connected with a company that have purchased an ore bed from Mr. Ruggles Wright, which lies one hundred rods to the northeast of No. 12 in the 6th Range, which belongs to the Randall estate. They have examined every lot on the mountain, but, as they could find no ore on the surface, they selected No. 11 in the 7th Range, where they have commenced operations, and as the road is now opened to the rear of your lots, and as they are contracting with persons who live backward, I think it very likely they will be trespassing on your lots, as few of these people have timber on their own land adapted for railroad purposes, and some of them have been with me wanting to know if you had anything to do with the land, or if I thought you would sell it, I told them that if they were found trespassing on any part of the land I would write to you, and they would then find that you were the only person had any power to do anything with it in any shape. I have paid the taxes on the

back lot, and you will have the goodness to let me know if statute labour must be done on absentee lands in Lower Canada, when they are not crossed, nor any road within a half-mile of them. Mr. Pink is dead since the beginning of August, after eight months' illness. Please direct to Robert Bannister, Hull, P. Q.—Yours truly,

(Signed)

ROBERT BANNISTER.

The opinion of the Honourable Her Majesty's Court of Queen's Bench for the Province of Quebec, at the city of Montreal, is requested with reference to the law of the said Province of Quebec, as administered by that Court, and so far as the same is applicable to the facts set forth in the above case, in terms of the statute of the Imperial Parliament, 22 & 23 Vic. ch. 63, upon the following

*Questions :*

1. Do the powers of the will of Robert Randall authorize a sale of lands in Quebec (1) by the executors named in the will or the survivors, or (2) by the administrator, *cum testamento annexo* ?

2. Is the deed, made by the administrator *cum testamento annexo*, to the plaintiff, valid by the law of Quebec, to sell and convey the said land and ore in pursuance of the terms of the said will ?

3. Has the defendant any title to that portion of the said lands claimed by him, or the ore in question therefrom, sufficient to defeat the title of the representatives of the testator, Randall, or of the plaintiff ?

4. What effect, if any, has the judgment of the Superior Court of the District of Ottawa, of which an exemplification is a part of this case, upon the plaintiff's title, if any he has ?

5. Could the plaintiff have maintained an action or actions in the Courts of the Province of Quebec, against the defendant herein, for the said land and the said ore, or either of them, before the same was removed from the Province of Quebec ; and could the plaintiff, in such action or actions, have recovered the said lands and the said ore, from the defendant herein ?

(Signed)

ROBT. G. DALTON,

C. C. & P. Q. B.

During Michaelmas term, November 18, 1875, Hector Cameron, Q. C., for the plaintiff, obtained a rule calling on the



defendant to shew cause why a case should not be prepared setting forth the facts of this case as ascertained by the finding of the learned Judge who tried the cause without a jury, and why such case should not be settled and approved of by this Court, and the questions of law arising out of such facts according to the law of the Province of Quebec be settled by this Court; and why an order should not be pronounced remitting the same, together with the case, to the Court of Queen's Bench of the Province of Quebec, sitting in ———, or such other Court as to this Court might seem proper; and desiring the same Court to pronounce their opinion on the questions so to be submitted to them.

During Hilary term, February 26, 1876, *Bethune*, Q. C., shewed cause, and *MacIennan*, Q. C., supported the rule.

The following rule was made: Upon reading the rule *nisi* issued in this cause in Michaelmas term last, and the evidence taken herein by the Honourable Mr. Justice Patterson, before whom this cause came on for trial, without a jury, at the last sittings of Assize and Nisi Prius at Ottawa, in and for the county of Carleton, and upon hearing the parties; it is ordered that this *case* and the questions of the law of the Province of Quebec arising out of the same, which have been settled and approved by the said the Honourable Mr. Justice Patterson, and are set forth in the schedule to this rule annexed, be remitted to Her Majesty's Court of Queen's Bench for the Province of Quebec, sitting at Montreal. And the said Court is hereby respectfully requested to pronounce its opinion on the questions contained in the said schedule upon the law of the Province of Quebec administered in the said Court of Queen's Bench for the Province of Quebec as applicable to the facts set forth in the said *case*, the said *case* being remitted pursuant to the Imperial Statute 22 & 23 Vic., ch. 63. And it is further ordered that this rule and the said case and the exhibits therein referred to, certified copies, and the questions settled as aforesaid, be transmitted forth-

with by the clerk of the Crown and Pleas to the proper officer of Her Majesty's said Court of Queen's Bench in the Province of Quebec.

The following answers were returned from the said Court of Queen's Bench, to which the case and questions were remitted :

CANADA :	}	Court of Queen's Bench,
Province of Quebec.		(Appeal side.)

Montreal, Friday the twenty-second day of September,	}
one thousand eight hundred and seventy-six.	

*Present :*

The Honourable Mr. JUSTICE MONK,
“                    “                    Mr. JUSTICE RAMSAY,
“                    “                    Mr. JUSTICE SANBORN,
“                    “                    Mr. JUSTICE TESSIER.
“                    “                    Mr. JUSTICE BELANGER, <i>ad hoc</i> .

In the case transmitted from Her Majesty's Court of Queen's Bench for Ontario for the opinion of the Court of Queen's Bench for Lower Canada (appeal side) upon certain questions as to the law of the Province of Quebec under the provisions of the statute of the Parliament of Great Britain and Ireland, 22 & 23 Vic. ch. 63, in a cause between :

JOHN STUART, Plaintiff,  
and

ALANSON HOVEY BALDWIN, Defendant.

The Court of Our Lady the Queen now here, having heard the plaintiff and defendant, by their counsel, respectively, on the interrogatories submitted, and mature deliberation being had, decides and answers as follows, viz. :

*First Question.*

Do the powers of the will of Robert Randall authorize a sale of lands in Quebec by the executors named in the will or the survivors, or by the administrator *cum testamento annexo*?

*Answer to the First Question.*

Yes, subject to modifications stated in answer to the fifth interrogatory.

*Second Question.*

Is the deed, made by the administrator *cum testamento annexo*, to the plaintiff, valid by the law of Quebec, to sell and convey the said land and ore in pursuance of the terms of the said will?

*Answer to the Second Question.*

Yes, as explained in answer to the fifth interrogatory.

*Third Question.*

Has the defendant any title to that portion of the said lands claimed by him, or to the ore in question taken therefrom, sufficient to defeat the title of the representatives of the testator Randall, or of the plaintiff?

*Answer to the Third Question.*

No, except as explained in answer to the fifth interrogatory.

*Fourth Question.*

What effect, if any, has the judgment of the Superior Court of the District of Ottawa, of which an exemplification is a part of this case, upon the plaintiff's title, if any he has?

*Answer to the Fourth Question.*

The Judgment of the Superior Court of the District of Ottawa, of which an exemplification is a part of this case, has no effect on the plaintiff's title, if any he has.

*Fifth Question.*

Could the plaintiff have maintained an action or actions in the Courts of the Province of Quebec, against the defendant herein, for the said land and the said ore, or either of them, before the same was removed from the Province of Quebec; and could the plaintiff, in such action or actions, have recovered the said land and the said ore, from the defendant herein?

*Answer to the Fifth Question.*

By the law of the Province of Quebec, the plaintiff could maintain an action for both the land and the ore, or for either of them, before the ore was removed from the Province of Quebec, but such an action for the ore would be an incident to the petitory action to vindicate the title to the land.

If the title were maintained the plaintiff would recover the ore *deductis impensis*, in accordance with articles 415, 416, 417, 418, and 419, of the Civil Code of Lower Canada.

If any action were instituted to recover the ore before or otherwise than by a petitory action to vindicate the title to the ownership of the land, it should be suspended until the title to the land is established. In regard to the suit pending in the District of Ottawa in the Province of Quebec, which would appear to be a possessory action, such possessory action while it is pending would prevent the plaintiff Stuart from instituting before a competent Court a petitory action according to article 948 of the Code of Civil Procedure of Lower Canada.

(True copy.)

[L.S.]

(Signed)

L. W. MAUBARY,

Clerk of Appeals.

Upon the return of the case, and the answers of the Court of the Queen's Bench of the Province of Quebec to the questions submitted accompanying the case, the learned Judge, who tried the cause, then gave his verdict on the 22nd November, 1876, for the plaintiff, and he assessed the damages for the plaintiff at \$5.

During Michaelmas term, November 28, 1876, *Bethune*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict for him obtained herein should not be set aside, and a verdict entered for the defendant, pursuant to the Law Reform Act and the Administration of Justice Act, on the ground that the plaintiff is not entitled to recover; and on the further ground, that upon the answers to the questions submitted to the Court of Queen's Bench for the Province of Quebec the plaintiff is not entitled to recover; and on the further ground, that Edwin Smith had no power to convey the land in the Province of Quebec under the statute of the Province of Ontario, it not appearing that in his application and affidavit he stated the value or probable value of the lands devolving as including this lot; and it appears that the value of the lands in Quebec is \$12,500, and the penalty of the bond filed is \$5,000. And



on the further ground, that the ore in question was severed before the exercise of the power of sale by Smith, and a right of action to recover the ore was vested in the heirs at law of Randall the testator, which could not be transferred by Smith to the plaintiff, so that if the lands were in Ontario the right of action could not be transferred; and that under chapter 91 of the Consol. Stat. L. C. the plaintiff could not maintain this action in Quebec.

*MacLennan*, Q.C., shewed cause. The will gives power only to the executors to sell. The effect of that devise in equity is, to convert the realty into personalty, which is made subject to the power. The 33 Vic., ch. 18, sec. 1, O., enables the administrator with the will annexed to execute any power of sale which the executors could have executed if they had been living. The 36 Vic. c. 20, O., does not apply, because the letters of administration here were issued before the passing of that Act. The Judge who tried the cause was of opinion the effect of the answers of the Court of Quebec was, that the plaintiff was entitled to a verdict. The Court of Quebec has decided that the action there brought by Stuart against Baldwin, and decided against Stuart, has no effect whatever upon or against Stuart's title. It was contended that Edwin Smith, the administrator with the will annexed, had no power to sell, because it was not stated in his application for administration what the value or probable value of the land was over which the powers of the will were to be exercised. It was contended the application and affidavit should have been produced at the trial to shew that the same were in accordance with the statute. It was not necessary to do that, because even if the administration can be impeached by some process taken for that purpose it is good so long as it stands. The Consol. Stat. L. C. ch. 91 enables a foreign administrator to act in Quebec: *Irwin v. Bank of Montreal*, 38 U. C. R. 375. The 33 Vic., ch. 18, sec. 2, O., requires a bond to be given by the administrator before he can sell. That was done, and it was proved. But it is said the bond is not sufficient, for it is taken only for the sum of \$5000, while the land was

of the value of and was sold to the plaintiff for \$12,500. The administrator could not tell when he gave the bond for what price he might be able to sell the land: Consol. Stat. U. C. ch. 16, secs. 63, 64; Imperial Act, 20 & 21 Vic. ch. 77, secs. 81, 82; *Re Powis*, 34 L. J. Pr. & Mat. 55; *Re Gent*, 1 Sw. & Tr. 54.

It is said the ore in question was severed by the defendant from the land before the plaintiff bought the land. The Court of Ontario has decided that the plaintiff is entitled by the law of Quebec to recover such ore, although severed.

In addition to that, the administrator had power to sell and did expressly sell the ore, whether severed or not severed.

It is said that the title to the ore was and is in Randall's heirs, but it must be remembered that the ore lay in Quebec at the time the plaintiff got his conveyance, and by the law of Quebec that ore although severed passed to the plaintiff.

*Bethune*, Q.C., supported the rule. The defendant had the ore in Quebec, the plaintiff seized it in Ontario, and he must prove his title to it when and where he took it. The Court of Quebec say the plaintiff cannot try any possessory action there until his title has been established in a petitory action, nor while he has any possessory action pending. If that be so, this action cannot be brought but upon the same terms and conditions on which the suit could be maintained in Quebec. The Court of Quebec assumed the possessory action was brought before the present suit. If that fact is in doubt the case should be again remitted to the Court of Quebec. The plaintiff is prosecuting his claim under the laws of Ontario, and he must shew a title to the ore sufficient according to that law. The ore belonged to the heirs at law of Randall at the time of the plaintiff's purchase, and the action should have been brought in their name. The plaintiff as purchaser from the administrator with the will annexed cannot sue for it. It is important, too, that the administration was not granted conformably to the statute, because the application for it and the affidavit required in obtaining it were not sufficient, and that affects the validity of the grant.

June 30, 1877. WILSON, J.—The title of the plaintiff to the ore in question has been disputed.

He claims under the will of Robert Randall, who was the patentee of the Crown.

The will was made on the 2nd March, 1829. By it the testator devised as follows:—"I hereby authorize my said executors, or the majority of them, or the survivor or the survivors of them, to sell and convey by deed or otherwise all my estate, real and personal, for such considerations, upon such terms, and in such manner as they may judge best. \* \* \* And the moneys which they may receive on account of debts due to me, or on account of sale or sales of my said personal or real property, after deducting therefrom so much as shall be necessary to pay debts, I hereby give and bequeath in the following manner, that is to say, to Maria Stark, £150; to Bellage, of Montreal, shop-keeper, £200. The remainder of my estate, if any, I wish divided into ten equal parts and disposed of in the following manner, that is to say," two-tenths to his daughter, Levina Culp and her four sons; three-tenths to Frederick Smith and his six children; two-tenths to his nephew G. G. Wilson and his sisters; one-tenth to his nephew Randall Wallace; and the remaining two-tenths to five persons therein named, two of them being executors of the will.

By a codicil the testator afterwards devised to his daughter, Mrs. Culp, and Maria Smith, therein named, "all the property owned by me in the said township of Humberstone after my expenses are paid; the said property with all my accounts coming to me from the canal company to be divided equally between the two above named legatees; and all the rest of my property, subject to the will being previously made to this one, to remain as it is."

There is nothing else in the will material in this case to be considered.

It appears that of the four executors named in the will one of them left the Province before the death of the testator, and never returned to it, and is no doubt long since dead; one of them renounced, and afterwards left the

Province, and is since dead; and two proved the will; one of these two died in 1834, and the other died in 1861; and that administration with the will annexed was granted on the 20th May, 1873, to Edwin Smith, a devisee named in the will of the testator, and he it was who conveyed the land in question to the plaintiff.

It was objected that the grant to Edwin Smith was invalid because in his petition (which is not now with the exhibits), and in the affidavit accompanying it for administration, he stated the value or the probable value of the lands devolving—according to the 33 Vic. ch. 18, sec. 1, O.—at only \$5,000; and because the penalty of the bond he then gave is only in the sum of \$5,000, while the value of the lands in Quebec was shewn to have been \$12,500.

These objections do not affect the validity of the administration as long as it stands. They may be cause sufficient for the surrogate to cite the administrator to shew cause why the administration should not be recalled, or to give better and greater security, but they cannot avoid every act which persons dealing with the administrator under the authority of these letters have done and have been induced to do by virtue of the administration.

There are many cases on that point referred to in the case of *Irwin v. The Bank of Montreal*, 38 U. C. R. 375, 387, 388; see also 36 Vic. ch. 20, sec. 45, O.

There is no evidence that the affidavit was not honestly made, and the value of the property therein not truly stated at the time.

And I presume the Surrogate would have authority, in the case of mistake as to the value of the estate, or of a very great rise in its value, to require the administrator to give more security to insure and effect the purposes of the grant, without in any way affecting or avoiding the force of the administration then existing.

The plaintiff's counsel argued that the administrator, with the will annexed, had full authority under the 33 Vic. ch. 18, sec. 1, O., to sell the land in question to the plain-



tiff, and that the 36 Vic. ch. 20 did not apply, because the grant of administration was made before the passing of that last Act.

The rule of the defendant does not contain that ground of exception to the verdict; and I have no note of his counsel having argued it as if it were in the rule.

It may be better to consider that subject, because if it be that the statute confers no authority to sell, the case of the plaintiff at once fails.

In the first place it is clear that under the power in the will contained, and by the other provisions of the will, the executors have a clear authority to sell and convey the real estate, and to deal with the proceeds of it as with ordinary personalty.

Then the 33 Vic. ch. 18, sec. 2, O., enacts, "Whenever, after the passing of this Act, there shall be in any will or codicil thereto of any deceased person, whether such will be made or such person shall have died before or after the passing of this Act, any power to any executor or executors in such will to sell, dispose of, appoint, mortgage, encumber, or lease any real estate, or any estate or interest therein whether such power be express or arise by implication, and whenever from any cause letters of administration with such will annexed shall have been by a Court of competent jurisdiction in Ontario committed to any person, and such person has given, or shall hereafter give, the additional security in the next preceding clause mentioned \* \* such person shall and may exercise every such power, and sell, dispose of, appoint, mortgage, encumber, or lease such real estate, and any estate or interest therein, in as full, large and ample a manner, and with the same legal effect for all purposes as the said executor or executors might have done."

The 36 Vic. ch. 20, O. repeals the above Act, but sec. 40 of it is precisely like the clause above stated. It was passed on the 29th of March, 1873, and before the administration was granted to Edwin Smith.

Under the above Act there appears to be no doubt that

the administrator with the will annexed had full power to make the sale to the plaintiff.

Then arises the question, whether the deed which the administrator made on the 31st of May, 1873, to the plaintiff, passed to him the ore in question, which was severed from the land before that day?

It is a conveyance not only of the land but of all "wood, timber, iron and other ores, and other property respectively of any and every nature and kind soever, which may have been severed or detached from the freehold of the said lands \* \* by any person or persons whomsoever, at any time or times, before the execution and delivery of these presents, and as well all those portions of the same respectively which shall or may be still remaining on the said lands \* \* as such other portions thereof which shall have been removed therefrom; and wheresoever the same respectively shall now or happen hereafter to be found, and all rights of action in respect thereof, or of the value thereof, or for trespass to and for the *mesne* profits of the said lands."

It was not contended that the devise conferred more than a power upon the executors to sell the lands and all the other property of the testator. It was not argued that any estate or interest in the land passed to the executors. That, no doubt, is the meaning, effect and operation of the will.

It is an absolute direction to sell, and not a mere discretionary right, which the executors may or may not exercise at their pleasure. It is therefore a conversion of the realty into personalty. It is a trust to sell.

On the death of the testator, under the trust to sell under the power, the legal title vested in his heir at law. He would be the person to bring ejectment or to defend the legal estate at law.

He would, however, be a trustee for the executors.

Where the testator had given power to his executors to sell, and after the making of his will he contracted to sell the lands to a purchaser, who required the heir-at-law of

testator to join in the conveyance, the Court, under the Trustee Act of 1850, made an order vesting the estate which was in the heir in the executors: *Re Badcock's Trusts*, 2 W. R. 386. So where it was doubted whether there was sufficient legal power of sale implied in the executors, or a sufficient charge of debts to enable him to convey the legal estate to a purchaser, the Court, under the Trustee Act of 1850, made a vesting order of the heir's estate: *Hooper v. Strutton*, 12 W. R. 367.

By holding that the executors who have power to sell lands have a legal power to convey "the difficulty is obviated of getting a reluctant heir to join in the sale; the testator having disinherited his heir could never mean him to act as trustee": *In arguendo*, *Bentham v. Wiltshire*, 4 Madd. 44, 47.

Upon the severance of trees or ores from the land the owner of the land had the right to treat the articles severed as goods and chattels against the wrongdoer, and to sue for or in respect of them as such: *Farrant v. Thompson*, 5 B. & Al. 826.

The plaintiff has got all the rights, powers, and interests which the donee of the power, the administrator with the will annexed had. The administrator had in strict law no right, by any legal title in himself, to take or to sell the ores which were severed from the land. If he had done so after his own appointment and before the execution of the power, it would have been done strictly by him as *cestui que trust*, or perhaps more correctly by reason of the relationship which was between him as *cestui que trust* and his trustee—or, in other words, by reason of the connection between him as agent and his principal the heir-at-law, or the person having the legal estate, and who in equity was trustee of the land and ores. And when he executed the power he passed the land to the purchaser who took directly under the will from Robert Randall, the donor of the power.

But at that time the ores in question had been severed from the freehold, and were then goods and chattels, which

the heir-at-law could at law sue for and recover, and if he died after such severance the title at law to such ores would have passed to his personal representative as part of his own and not as part of his ancestor the testator's estate, and would not have descended to his heir. Yet the heir, notwithstanding such severance, would have had only a fiduciary interest in the ores so severed; the beneficial interest in them would still have remained in and with the donee of the power.

If the heir at law sued for such severance he would have sued because the ores remained vested in him as part of the inheritance: *Pomfret v. Ricroft*, 1 Wms. Saund. 322 d., n. 5, ed. of 1871, p. 557, 566, n. 5.; *Co. Litt.* 57 a.

The donee of the power could have sued at law any one for or in respect of these ores in the name of the heir, and he could have sued any one in respect of them in equity in his own name. So he could in the execution of the power sell and convey to the purchaser of the land the interest which he had as such donee of the power in the ores.

Substantially, as between the donee of the power and the heir, the ores, notwithstanding the severance, remained after such severance just as they were before their removal from the soil.

I am of opinion the conveyance by the administrator did not by the mere power of his own appointment, except in equity, pass the legal title to the ores so severed. If it did not pass the ores as part of Robert Randall's estate, it may be assumed that the donee of the power as *cestui que trust* had authority from the heir or person having the legal estate as trustee to deal with such ores as his agent, in such manner as he pleased, and so to take possession of them, or to sell and assign them to the plaintiff.

That presumption has been made in many such cases, and as against a merely formal objection it may very reasonably be raised in favour of the substantial right.

The tenant under a lease from the *cestui que trust* may be considered as the tenant of the trustee, the act of the *cestui que trust* being deemed to be the act of the trustee,



the former being held for the purpose to be the agent of the latter : *Vallance v. Savage*, 7 Bing. 595.

In *Pope v. Biggs*, 9 B. & C. 245, a tenant of the mortgagor made after the mortgage executed is bound to pay rent to the mortgagee after notice given to the tenant by the mortgagee to do so, although, as Tindal, C. J., said in the case just referred to of *Vallance v. Savage*, 7 Bing., at p. 600, "their interests are adverse." See *Keech v. Hall*, Doug. 21 ; See also *Trent v. Hunt*, 9 Ex. 14, which is very highly approved of by all the Judges in *Snell v. Finch*, 13 C. B. N. S. 651, pp. 651, 656, 659.

In this case too, as the ores so severed became goods and chattels, a title to them might pass without any deed or writing from the heir to the donee of the power ; and in presuming that they may have passed, or in holding that under the circumstances they may and should be considered as having become the legal as they were the equitable property of the donee of the power, we are doing, in my opinion, no violence to any real opposing right or interest, and are not dispensing with a deed where a deed as the means of conveyance would be necessary to confer and to transfer a title.

I am of opinion then that a title to the ores so severed, as part of the estate of Robert Randall, may upon the facts, be presumed to have passed to the plaintiff by the conveyance of the administrator with the will annexed, or as part of the personal property of the heir or person having the legal estate to the land, by reason of the beneficial ownership which the donee of the power had, and the implied power he may be presumed to have had, in the absence of all evidence to the contrary, to take, sell, and deal with the ores as the agent of the trustee or person having the mere legal estate.

And it must be remembered throughout that the defendant bought with a knowledge of the Randall title, and from persons who were the children of one Samuel Pink, who occupied a part of lot 13, and who exercised a species of control under authority of persons acting for the Randall estate.

So far the case has been considered as if the lands were situate in Ontario, and as if the ores at the time the power was executed were in this Province. At that time the ores were severed, but still they were in the Province of Quebec where the lands were situated, and as I understand the opinion of the Court of Queen's Bench transmitted to us, these ores were the property of the plaintiff under the deed on which he relied. It appears then, however the law may be if the ores had been in Ontario at the date of the deed, that the plaintiff acquired a title to them in the Province of Quebec where they were then situated; and either title is sufficient for the purpose of the action.

There remains still the matter to be considered upon which the opinion of the Court of Queen's Bench at Montreal, in the Province of Quebec, was taken under the Imperial Statute 22 & 23 Vic., ch. 63. As to cases sent for opinions under that Act see *Topham v. Portland*, 32 L. J., Ch. 257; *Wilson v. Moore*, 12 W. R. 1137.

That Court has decided upon the case which was transmitted to them for their opinion, that the will of Robert Randall authorized a sale of the lands in question, which are situate in Quebec, by the executors or the survivor of them, or by the administrator with the will annexed: that the deed to the plaintiff is a valid deed by the law of Quebec to sell and convey the lands and ores under the will, and that the defendant has no title to the land or ores sufficient to defeat the plaintiff's title.

These answers are all subject to the special circumstances stated in the fifth answer.

The fourth answer is, that the judgment recovered by the now defendant as plaintiff in a suit brought by him against the now plaintiff as defendant has no effect on the title of the now plaintiff, if he has any.

The now defendant declared in effect in that action that the lands in question belonged to him, and that the now plaintiff had troubled him by a suit in respect of the land, and by seizing the ore taken by the now defendant from the land, and by damaging and prejudicing the now defendant's title to the said land.

And he prayed that by the judgment of the Court he should be declared to have been, during all the time therein mentioned, and to be still duly seised and possessed of the land as proprietor thereof; and that he be maintained therein and the enjoyment thereof; and that the now plaintiff should be ordered, adjudged, and condemned not to trouble or disturb the now defendant in his possession in the future; and to pay the now defendant his damages, laid at \$10,000, with interest and costs of suit.

The now plaintiff appears, as defendant, to have demurred to the declaration, as I may call it, and to have stated specially his cause of demurrer, and also to have pleaded in fact to the declaration setting up title to the land.

The now defendant demurred to the plea, setting out the causes of demurrer, and upon these demurrers the Court dismissed the now plaintiff's *defense en droit* (demurrer) as unfounded in law, and maintained the *defenses en droit* (demurrers) to the now plaintiff's plea, with costs. And upon such pleadings the Court of Queen's Bench, to whom this matter was referred, has declared that such judgment has no effect on the now plaintiff's title, if he has a title.

Upon that finding, which we must adopt as our guide upon a matter specially and peculiarly within the knowledge and jurisdiction of the Court, the question of title is still open and controvertible between these parties.

By the fifth answer of the Court, which is the governing one, and is explanatory of the other answers they have given, they have declared the plaintiff could, by the law of the Province of Quebec, maintain an action for both the land and the ore, or for either of them, before the ore was removed from that Province. But the action for the ore would be one incident to the petitory action to vindicate the title to the land.

If the title were maintained, the plaintiff would recover the ore, *deductis impensis*, in accordance with articles 415, 416, 417, 418, and 419, of the Civil Code of Lower Canada.

And if an action were instituted to recover the ore before

or otherwise than by a petitory action to vindicate the title to ownership of the land, it should be—perhaps it was meant it would be—suspended until the title to the land was established.

That answer establishes that the plaintiff, by the law of the Province of Quebec, where the land is situated, could, while the ore was in that Province, have maintained an action for both the land and the ore, or for either of them.

If the action were brought for the ore alone before or otherwise than by a petitory action to vindicate the title to ownership of the land, it would be stayed until the title to the land was established.

That is, as I understand it, if it were necessary to establish the title, but not otherwise. If, for instance, the plaintiff were in possession, and a mere trespass had been committed, the act or fact of trespass alone might be in controversy without any claim being made to the land by the defendant, or without the title of the plaintiff to the land being disputed.

If the title to the land is in contention, then the ore may be sued for separately from any claim of title being put forward to the land by the plaintiff, or a petitory action may be brought. In the former case the proceedings for the ore will on such separate action be stayed by the Court until the title to the land be first settled by a petitory action. That is an action I believe somewhat like an ejectment in which the title to the land is in question. If the plaintiff succeed in it, and if he had before brought an action for the ore, he would be at liberty then to continue it. But he may, instead of prosecuting separately for the ore, recover as an incident in the petitory suit compensation for the ore which had been taken from the land by the defendant.

Such incidental claim is, I believe, in the nature of our claim for *mesne* profits, but it is adjudicated upon in the petitory action if the plaintiff desire it, or it may be sued for in a separate action, as by our law for *mesne* profits he would be obliged to do, if the plaintiff elect to do so.

We are in effect trying the title to the land, because we



cannot determine with respect to the ownership of the ore until we have determined who is the owner of the soil from which the ore was taken.

In the Province of Quebec the Court would not try the title to the ore until the title to the ownership of the land, in such a case as is presented to us here, between those parties was first established.

And it is insisted on by the defendant that we should not adjudicate with respect to the ore, until the title to the realty has been tried and determined in the Courts of Quebec, where that question should only be tried.

This is not a real action, or one in which the venue is local. If it were so we could not in Ontario decide upon a matter which was by its locality confined alone to Quebec.

In *Doulson v. Matthews*, 4 T. R. 503, it was held that trespass could not be maintained for breaking and entering a house in Canada.

In that case Buller, J., said, p. 504: "We may try actions here which are in their nature transitory, though arising out of a transaction abroad, but not such as are in their nature local."

In *Whitaker v. Forbes*, L. R. 1 C. P. D. 51, it was determined that an action of debt could not be brought in England under the law which existed, as to venue, before the late Judicature Act, for arrears of a rent charge due upon land in Australia.

It is every day's business of the Courts to try questions of foreign law. In actions on bills of exchange and other contracts, in questions of descent and marriage, and every other matter which is the subject of judicial enquiry. And it may arise in many forms. Here, in an action as to the proprietorship of the ore, we have to determine the preliminary question, as to the proprietorship of the land from which it was taken.

We could not entertain an action for breaking and entering into these lands, but we can entertain an action for the ore which by its severance has become chattels, to try who is the owner of it.

An action for assault and battery could be tried here, although the defendant pleaded he committed the alleged trespass in defence of his possession of a house situate in a foreign country, and issue was joined upon the title.

I presume also an action for damages for not completing a purchase of land situate in a foreign country upon a good title being shewn, on an averment, that a good title was shewn, could be tried here, although the Court would have to try whether a good title to the land by the law of that foreign country had been shewn.

This action for the ore being maintainable in some form in Quebec can be maintained here. That it is maintainable there only as incidental to an action which tries the right to the realty, or after that right has been determined, is of no consequence, for we are in this action for the ore trying the question of title to the land as governing the right and proprietorship to the ore—not directly but as incidental, although essential, to the decision upon the personalty.

In *Scott v. Seymour*, 1 H. & C. 219, in Ex. Ch., an assault and imprisonment took place in a foreign country. The plaintiff sued in England for them. Pleas were pleaded.

Wightman, J., said in his judgment, p. 233:—"We are all of opinion that the second and third pleas in this case are bad, and afford no answer to the action. They admit the right to compensation in damages by such trespasses, but they state that by the Neapolitan law they cannot be recovered until certain penal proceedings have been commenced and determined there. This is an objection to procedure merely, which must be determined by the *lex fori*, and not by the *lex loci*."

Blackburn, J., said, p. 237:—"If, indeed, the plea had averred that by the law of Naples no damages are recoverable for an assault however violent, that would have raised a question upon which I have at present not made up my mind. I doubt whether it would be a good bar."

I am of opinion this action is well brought here, although it could not in the same circumstances be brought in the

Province of Quebec, in the like form, or in the like order of time in which it is brought here. The case of *The Buenos Ayres and Ensenada Port R. W. Co. v. The Northern R. W. Co. of Buenos Ayres*, L. R. 2 Q. B. 210, D., has some relation to this part of the case.

I may say that the articles 415 and 419 in the *Code Civile*, referred to by the Court of the Province of Quebec, will have full effect given to them in that Province, when the plaintiff takes proceedings to recover the possession of the land, or to disturb the defendant in his occupation. They have no application at present in the action before us.

Something was said of the defendant being a *bona fide* possessor, and therefore not liable to account for the profits of the land during the term of his occupancy, according to the law of Quebec.

We have not that properly before us. If it were intended that matter should have been considered, it should have been specially referred to the Court of Quebec with the other questions.

So far as we can see what it is in our law, it being an equitable rule only, I may refer to *Dormer v. Fortescue*, 3 Atk. 124, where it is said, "Where a man shall be said to be *bona fide* possessed is where the person possessing is ignorant of all the facts and circumstances relating to his adversary's title, which could not be here as Fortescue had all the deeds and the very settlement on which the title depends." See also *Hicks v. Sallitt*, 3 DeG. M. & G. 782, 813, 18 Jur. 915, and *The Lord Advocate v. Drysdale*, L. R. 2 Sc. App. 368.

According to article 412 of the *Code Civile* "A possessor is in good faith when he possesses in virtue of a title the defects of which as well as the happening of the resolutory cause which puts an end to it are unknown to him. Such good faith ceases only from the moment that these defects or the resolutory cause are made known to him by proceedings at law." See also article 411.

I very much doubt whether the defendant could establish an occupancy in good faith according either to the *Code*

*Civile* or to the doctrines of the Court of Equity, whichever rule of law he might have claimed to avail himself of in this action. But he has made no such claim.

I may also refer on the subject of foreign law, when and to what extent it is applied to the rights of litigants: *Shaw v. Gould*, L. R. 3 H. L. 56; *The Halley*, L. R. 2 P. C. 193; *Ex parte Melbourne*, L. R. 6 Ch. 64.

I think, upon the whole, the rule should be discharged.

HARRISON, C. J., and MORRISON, J., concurred.

*Rule discharged.*

WILLIAM J. ACHESON v. THOMAS C. McMURRAY, SUSAN McMURRAY, AND MARY KETCHUM.

*Lease—Surrender by operation of law—Acquiescence in improvements—Estoppel.*

In ejectment for a village lot, the plaintiff claimed under a lease from K., one of the defendants, which the defendants alleged had been surrendered by operation of law. The lease was made in 1873, for ten years, to the plaintiff, who took possession, and built a house on it, which in October, 1875, was destroyed by fire, and in February, 1876, the plaintiff became insolvent. There was rent in arrear, which the plaintiff could not pay; K.'s attorney said he was willing to take the place off their hands; and either the plaintiff or his wife delivered to him a copy of the lease, which he supposed to be the original, saying the lease was given up; plaintiff's wife afterwards told K. that the lease was given up, and K. promised to lease to her a shop in a block she was then building. K. then leased this land to the other defendants, who at once proceeded to expend about \$3000 in building upon it, which the plaintiff, living in the village, though aware of it, made no objection to; but when the foundation was nearly completed he registered the lease. A difficulty arose as to the other lease promised to the plaintiff's wife, and the plaintiff brought ejectment. The learned Judge, who tried the case without a jury, held that there had been a surrender of the lease by operation of law, and that the plaintiff was precluded by his acquiescence from disputing defendants' title, notwithstanding the alleged notice to them by registration of the lease. *Held*, that the finding was right upon both points, and that the plaintiff could not recover.

EJECTMENT for the recovery of possession of the westerly portion of village lot No. 4 in Block No. 1 of Ketchum's survey of part of the village of Orangeville.



The title set up by the plaintiff was under and by virtue of a lease made by Jesse Ketchum and Mary Ketchum to the plaintiff, dated 30th August, 1873, for a term of years yet unexpired, and by assignment from Johnston Lindsay to the plaintiff, dated 13th March, 1877.

The defendant Mary Ketchum claimed title under and by virtue of a surrender to her of the unexpired term of the lease mentioned in the plaintiff's notice of title; and the defendants Thomas C. McMurray and Susan McMurray claimed to hold by virtue of a lien on the land for \$10,000, being the extent by which the value of the land was enhanced by improvements made by them.

Besides, all the defendants pleaded on equitable grounds, that Mary Ketchum demised the land to the defendant Susan McMurray for a term of years under the belief that the plaintiff had surrendered the term created by the lease mentioned in the plaintiff's notice of title; and the defendants McMurray, believing that the lease had been surrendered, accepted the demise, and entered upon the land thereunder, and expended large sums of money thereon in the erection of buildings and other permanent improvements thereon, of all which the plaintiff had notice and acquiesced in the conduct of the said defendants, and did not make any claim to the right of occupation thereof, nor give notice to the said defendants that he had not surrendered the lease, nor forbid the defendants entering upon or occupying the land and making such improvements.

The defendants Thomas C. McMurray and Susan McMurray also claimed title in themselves under and by virtue of a demise thereof to the defendant Susan McMurray by the defendant Mary Ketchum, the owner of the fee, for a term not yet expired.

Issue.

The case was tried at the last assizes for the county of Wellington before Wilson, J., without a jury.

On 30th August, 1873, Jesse Ketchum and Mary his wife, being the owners in fee of the land, made a demise thereof to the plaintiff for the term of ten years

from 12th February, 1873, at the annual rental of \$80, payable quarterly on 12th May, August, November, and February, in each year.

The plaintiff, who was a jeweller and dealer in fancy goods, accepted the demise, entered into possession of the land described, and built thereon a dwelling house and place of business.

In October, 1875, the premises were destroyed by fire, and plaintiff became insolvent.

On 28th February, 1876, a writ of attachment in insolvency issued against the estate and effects of the plaintiff.

On 27th March, 1876, there was a meeting of the creditors. He, at that meeting, made a sworn statement of his assets and liabilities. No mention whatever was made of the lease in question in his statement of assets. The assets were described as consisting only of stock in trade, shop furniture, and book accounts. The statement shewed an apparent deficiency of \$321.62 between the assets and liabilities. It was sworn to be a true statement of his assets and liabilities.

Mary Acheson, the plaintiff's wife, after that meeting offered twenty-five cents in the dollar in payment of her husband's liabilities, and this the inspectors of the creditors on 7th April, 1876, accepted, and authorized J. W. Shaw, the assignee, to assign to Mrs. Acheson "all the estate and property whatsoever" vested in him as assignee of her husband's estate.

On 26th April, 1876, the assignee, under the direction of the inspectors, delivered to the wife possession of the assets of her husband.

The assignee was not then or previously informed of the lease, and did not at that time intend in any manner to deal with it.

There was rent in arrear on the lease, and the attorney for the surviving lessor, Mrs. Ketchum, was pressing Mr. and Mrs. Acheson for payment. They had not the means to rebuild on the land, and talked of giving up the lease. The attorney said he was willing to take the place

off their hands. Either Acheson or his wife afterwards delivered to the attorney a copy of the lease, which was described to him as the lease, and which he supposed was the original lease, saying the lease was given up. This was in June or July, 1876. Mrs. Acheson afterwards told Mrs. Ketchum that the lease had been given up, and the latter promised to let her have a shop in a block she was then building and the flat over that shop for \$350 a year. Mrs. Acheson appeared to be pleased, and shortly afterwards left for a trip to Philadelphia. She returned, and some difficulty arose about the shop proposed to be given her. It appeared that Mrs. Ketchum's son had rented the flat over the store proposed to be given her, and Mrs. Ketchum was unable to do as she promised. Mrs. Acheson represented that the giving up of the old lease was conditional on her getting a lease of the store and flat above for a similar term. This condition was denied both by Mrs. Ketchum and her attorney who accepted the surrender of it for her.

Before this difficulty arose, that is, on 24th August, 1876, Mrs. Ketchum had in good faith executed to the defendant Susan McMurray a lease of the land described in the Acheson lease for seventeen years from 1st July, 1876, at the annual rental of \$124, payable quarterly.

The new lessee at once proceeded to expend money for the purpose of making permanent improvements on the land, and with the aid of Mrs. Ketchum, on the security of the land, borrowed money from a building society for that purpose.

When the foundation of the new building was about completed, Mr. Acheson or Mrs. Acheson for the first time registered the original lease, but did not, although living in the locality and knowing of the expenditure being made on the property, in any other manner notify defendants McMurray that they or either of them had any title or intended to make any claim to the land.

The buildings put up by the defendants McMurray were worth from \$2,500 to \$3,000.

After the registry of the Acheson lease Mrs. Acheson insisted that she would have not only the shop, but the flat above, according to Mrs. Ketchum's promise, but the parties were unable to agree upon that or any substitute for it.

Mrs. Acheson thereupon, on 13th March, 1877, procured from the assignee of her husband's estate a deed of transfer of "all the estate and effects" of the insolvent.

On the same day she made an assignment by deed of the land, specifically described, to Johnston Lindsay, who, on the same day, conveyed to the plaintiff.

The plaintiff, on 15th March, 1876, commenced this action.

The learned Judge held that the conveyance from the assignee in insolvency could not be controverted by the defendant, but that there had previously been a surrender of the Acheson lease to Mrs. Ketchum. He held that the surrender was not conditional. He also held that there was such acquiescence on the part of the plaintiff and his wife as to preclude them in equity from disputing the right of the defendants McMurray to the property. He was of the clear opinion that, if defendants could not successfully resist the suit, they were entitled to a lien on the land for \$2980, and so decided. He entered a verdict for the defendants.

During this term, May 22, 1877, *McCarthy*, Q. C., obtained a rule calling on defendants to shew cause why the verdict should not be set aside and a verdict entered for the plaintiff, pursuant to the Law Reform Act, upon the ground that the plaintiff did not surrender the lease under which he held the premises in question for a period not yet expired, and was and is entitled to the possession of the said premises; and that the facts alleged in the equitable pleas were not supported in evidence; and that no fact was established in evidence which caused an estoppel to the plaintiff setting up his title to the said premises.



During the same term, June 7, 1877, *F. Osler* shewed cause. The title, if any, is not in the plaintiff, but in the assignee of his estate: *Bertram v. Pendry*, 27 C. P. 371; *Mason v. The Merchants' Bank*, Ib. 383; *McLaren v. Chambers*, 1 App. 68. The plaintiff's title is at an end, for there was a surrender in law of the lease under which he claimed: *Crocker v. Sowden*, 33 U. C. R. 397; *Carpenter v. Hall*, 16 C. P. 90; *Coffin v. Danard*, 24 U. C. R. 267; *Doe d. Burr v. Denison*, 8 U. C. R. 185; *Thomas v. Cook*, 2 B. & Al. 119; *Nickells v. Atherstone*, 10 Q. B. 944; *Davison v. Gent*, 1 H. & N. 744; and if not, the plaintiff by acquiescence is estopped from asserting his title: *Cairncross v. Lorimer*, 7 Jur. N. S. 149.

*McCarthy*, Q. C., contra. There is nothing in the Insolvent Act to prevent the assignee dealing with the leasehold estate, so the plaintiff as against this objection is entitled to succeed. The surrender, if any, of the lease was conditional, and the condition was not performed: *Grant v. Lynch*, 6 C. P. 178, 14 U. C. R. 148; *Pettigrew v. Doyle*, 17 C. P. 34; *Horton v. Macconnichy*, 9 C. P. 186. There was no estoppel by acquiescence: *Ramsden v. Dyson*, L. R. 1 H. L. 129, 141. There was notice of the plaintiff's title under the Registry Act, 31 Vic., ch. 20, sec. 66, O.

June 30, 1877. HARRISON, C. J. The principal question for decision is, whether it ought on the facts proved at the trial to be held that the lease under which the plaintiff claims was surrendered by operation of law.

Surrender by operation of law is as old as the time of Lord Coke, *Co. Litt.* 337 b., *Shep. Touch.* ch. 17.

It is excepted from the operation of the 3rd section of the Statute of Frauds.

It is declared by that section that "no leases, estates, or interests, either of freehold or terms of years, or any uncertain interest, in any messuages, manors, lands, tenements or hereditaments, shall \* \* be surrendered unless it be by deed, or note in writing, \* \* or *by act and operation of law*." And by sec. 4 of Consol. Stat. U. C., ch. 90, that "a surrender in writing of any

land not being an interest which might by law have been created without writing, shall be void at law, unless made by deed."

The only recognized exception therefore to the necessity of a surrender under the operation of these two statutes being by deed, is where the surrender can on the facts be said to be "a surrender by operation of law."

The acceptance of a new lease, inconsistent with the terms of the old lease, by a tenant from his landlord, was for a long time almost the only case in which it could be said there was a surrender by operation of law: *Roe d. Berkeley v. Archbishop of York*, 6 East 86. See further *Doe d. McDonell v. McDougall*, 3 O. S. 177; *Doe d. Biddulph v. Poole*, 11 Q. B. 713; *Horton v. Macconnichy*, 9 C. P. 186.

In *Mollett v. Brayne*, 2 Camp. 103, Lord Ellenborough held that a tenancy from year to year created by parol was not to be deemed surrendered by operation of law through the landlord simply giving to the tenant a parol notice to quit, and the tenant quitting accordingly.

But in *Stone v. Whiting*, 2 Stark. 235, Holroyd, J., started the idea that an agreement between the landlord, the tenant, and a third person, that the third person should be substituted as the tenant, operated as a surrender in law of the old lease.

In *Matthews et al. v. Sawell*, 8 Taunt. 270, it was assumed, but not decided, that the acceptance of the new tenant with the assent of the original tenant was a surrender in law.

The point was first authoritatively determined in the case of *Thomas v. Cooke*, 2 Stark. 408, 2 B. & Al. 119, in which it was decided that the acceptance of the new tenant with the assent of the original tenant had on some principle of estoppel, not then explained, the effect of operating as a surrender in law.

This case has often been referred to and commented on in subsequent cases, but is in no case overruled: See *Pronguey v. Gurney*, 37 U. C. R. 347, 356.

If the matter be *in fieri*, if the old tenant still retain possession, there cannot be said to be a surrender of the term: *Doe d. Huddleston v. Johnston*, Mc. Cl. & Y. 141; *Morrison v. Chadwick*, 7 C. B. 266; *Grant v. Lynch*, 6 C. P. 178; *McLeod v. Darch*, 7 C. P. 35; *Elsworth v. Brice*, 18 U. C. R. 441.

So long as it can only be said that there is an agreement to give up possession, and not an actual giving up of possession to the landlord, it is clear that there must be a deed or note in writing to make the surrender effective: *Johnstone v. Huddlestone*, 4 B. & C. 922; *Grant v. Lynch*, 14 U. C. R. 148.

Where the tenant not only gives up possession in pursuance of the license of the landlord, and the landlord accepts the possession, whether there be a demise to a new tenant or not, it is also clear the landlord is precluded from suing for the rent under the original lease: *Grimman v. Legge*, 8 B. & C. 324; *Gore v. Wright*, 8 A. & E. 118.

If the landlord not only accept the possession from the tenant but demise to another, this affords strong evidence of a surrender by operation of law: *Reeve v. Bird*, 1 C. M. & R. 31; *Bees v. George*, 2 C. M. & R. 581; *Walker v. Richardson*, 2 M. & W. 882; *Turner v. Hardey*, 9 M. & W. 770; *Davison v. Gent*, 1 H. & N. 744; *Walker v. Godè*, 6 H. & N. 594.

In *Lynch v. Lynch*, 6 Ir. L. R. 131, the doctrine of *Thomas v. Cook*, 2 B. & Al., 119, which was the case only of a chattel interest, was applied to the case of a freehold estate, but *Lynch v. Lynch* has been since doubted in *Creagh v. Blood*, 3 Jones & L. 133.

In *Lyon v. Reed et al.*, 13 M. & W. 285, it was also doubted, notwithstanding the decision of *Thomas v. Cook*, 2 B. & Al. 119, if a demise of the premises by the reversioner to a stranger, with the consent of the lessee in possession, amounted to a surrender by operation of law.

In *Lyon v. Reed et al.*, Parke, B., said of surrender by operation of law, at pp. 305, 306, that "This term is applied to cases where the owner of a particular estate has been a

party to some act, the validity of which he is by law afterwards *estopped* from disputing, and which would not be valid if his particular estate had continued to exist. There the law treats the doing of such an act as amounting to a surrender."

But in *Nickells v. Atherstone*, 10 Q. B. 944, it was held that *Thomas v. Cook*, notwithstanding the reflections supposed to be cast upon it in *Lyon v. Reed*, was good law to the full extent of all the authorities following and upholding it between the date of its decision in 1818 and *Lyon v. Reed* in 1844.

*Nickells v. Atherstone*, 10 Q. B. 944, rather than *Lyon v. Reed*, has received the approbation of this Court: *Doe d. Burr v. Denison*, 8 U. C. R. 185.

The principles of *Thomas v. Cook*, 2 B. & Al. 119, are in their integrity accepted and acted upon in Courts of Equity: *McDonnell v. Pope*, 9 Hare 705.

Indeed it would now seem from the cases that any agreement between the landlord and the tenant which results in a change of the possession, whether the former acts upon the agreement by re-letting, or himself takes possession, there is a surrender by act and operation of law.

Thus, the giving up and cancelling of the old lease by the tenant, although not of itself a surrender of the term, is yet a strong circumstance to be considered in connection with the subsequent conduct of the parties, and where that conduct shews that both parties treated the lease as at an end, and a jury so find, the Court will hold that there was a surrender: *Doe d. Burr v. Denison*, 8 U. C. R. 185.

The delivery back of the key by the tenant *animo sursum reddendi*, and the unequivocal acceptance of it by the landlord, is sufficient for the purpose of the surrender: *Dodd et al. v. Acklom*, 6 M. & G. 671.

So where the tenant left the key at the counting house of the landlord, and the latter, although at first refusing to accept it, afterwards put up a board to let the premises, painted out the tenant's name from the front, and used the



key to shew the premises to persons enquiring about the premises. *Phené v. Popplewell*, 12 C. B. N. S. 334.

The latter case has been approved in this Court in *Coffin v. Danard et al.*, 24 U. C. R. 267; and in *Crocker et ux. v. Sowden et al.*, 33 U. C. R. 397.

It was not cited in *Carpenter v. Hall*, 16 C. P. 90, where the Court of Common Pleas arrived apparently at a contrary conclusion, but the decision of the Common Pleas may, I think, be distinguished upon the ground that the conduct of the parties did not shew an unequivocal delivery of the key.

I am satisfied on the authorities that there was evidence in this case, without any reference to the subsequent lease and the conduct of the plaintiff in reference thereto, from which the learned Judge might infer, as he did infer, that there was an unconditional surrender of the old term.

This opinion is however much strengthened by the subsequent conduct of the parties. All parties reside in the same village, a village where the acts of the defendants McMurray with regard to the property in the making of visible improvements must have been known, and were proved to have been known, to the plaintiff. The landlady having accepted the delivery of the old lease, or a copy of it, supposing it to be the original, made a demise of the same premises to a third person; that person proceeded to expend, and did expend, a large sum of money in making permanent improvements on the property. All this happened without interruption or claim of any kind from the plaintiff. Such conduct on the part of the plaintiff was, I think, evidence from which an assent on his part to the new lease, if necessary to constitute a surrender by operation of law, may and ought to be inferred.

Whether evidence of such assent or not, I entertain no doubt that in equity the plaintiff, without payment of the value of the defendant's improvements, ought to be restrained from disturbing the possession as he is attempting to do by the present action of ejectment.

Lord Campbell, in *Cairncross v. Lorimer*, 7 Jur. N. S. 149, said: "By the laws of all civilized nations, if a man either by words or by conduct has intimated that he consents to an act which has been done, and that he will offer no opposition to it, although it could not have been lawfully done without his consent, and he thereby induces others to do that from which they otherwise might have abstained, he cannot question the legality of the act he had so sanctioned, to the prejudice of those who have so given faith to his words, or to the fair inference to be drawn from his conduct."

This well known principle of estoppel, recognized alike by Courts of law and equity, will be found more fully, if not more accurately stated by Brett, J., in *Carr v. London and North-Western R. W. Co.*, L. R. 10 C. P. 307, 316.

It will be found applied to a case like the present in *Ramsden v. Dyson*, L. R. 1 H. L. 129, 140, 168, where it was held that if a stranger begin to build on the land of another supposing it to be his own, and the real owner perceiving his mistake abstain from setting him right, and leaves him to persevere in his error, a Court of equity will not allow the real owner to assert his title to the land.

The rule that a party in good faith making improvements on property which he supposed to be his own, whether he has a lien or not, will not be allowed to be disturbed in his possession even if his title prove bad, is one to be actively enforced in equity even although no action has been brought to interfere with the possession: *Gummerson v. Banting*, 18 Grant 516.

It is a rule now recognized and extended by the Legislature by the passing of the 36 Vic. ch. 22, O., which declares that "In every case in which any person has made, or may make lasting improvements on any land under the belief that the land was his own, he or his assigns shall be entitled to a lien upon the same to the extent of the amount by which the value of such land is enhanced by such improvement": See *Romanes v. Herns*, 22 Grant 469 ;

*Smith v. Gibson*, 25 C. P. 248; *Carrick v. Smith*, 34 U. C. R. 389; *O'Connor v. Dunn*, 37 U. C. R. 430.

It does not appear to us to be sufficient for the plaintiff in answer to be able to say "although I did not actually interfere to put you right, I registered my title, if any, in the registry office, and so at all events you had what the Legislature calls actual notice under the operation of 31 Vic. ch. 20, O., as amended by 36 Vic. ch. 17, sec. 4, O."

The plaintiff in abstaining from an active assertion to the defendants McMurray of the supposed title, and in contenting himself with a simple registry of it in the registry of titles, appears to have been as devoid of good faith as he was when he abstained from placing the lease in his sworn schedule of assets, and afterwards through his wife obtained an assignment of it from the assignee, although it was never taken into account by the assignee or by any of the creditors at the time of the sale of the assets to her.

He alone, however, is not to blame for the present litigation. The defendant Mrs. Ketchum does not appear to have acted towards the plaintiff's wife in the good faith the latter had some reason to expect. Whether the surrender of the old lease was made solely because the plaintiff was a bankrupt, and had not the means either of building or paying the rent, or was made, as represented by his wife, conditionally upon the granting of a new lease of a shop, with the flat above, it was quite plain that the promise made by Mrs. Ketchum of the shop, whether depending or not on the surrender of the old lease, was to have a flat above; and that Mrs. Ketchum, instead of performing her promise, submitted to the lease of the flat by her son, and refused to give the plaintiff's wife a fair equivalent for it, and unreasonably objected to break the ceiling of the shop which she proposed to give.

The ground, however, upon which I think the plaintiff fails is, that the lease under which he claims is not a subsisting lease, and therefore the possession of the defendants ought not to be disturbed.

I do not at all rely upon 36 Vic. ch. 22, O., for the pur-

poses of this decision ; but acting independently of it, and acting as if that statute had never been passed, I am of opinion that the learned Judge was justified in finding that what took place between the parties put an end to the lease under which the plaintiff claims title. See *Duchess of Kingston's Case*, 2 Smith's L. C. 7th ed. 773, 856, *et seq.*

This renders it unnecessary for me to express any opinion upon the objections raised by the defendants under the Insolvency Act for the purpose of defeating the plaintiff's title, and in support of which the cases of *Bertram v. Pendry*, 27 C. P. 371, *Mason v. The Merchants' Bank*, Ib. 383, and *McLaren v. Chambers*, 1 App. 68, were cited.

The rule must be discharged.

MORRISON, J., and WILSON, J., concurred.

*Rule discharged.*

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KATE DOUGLASS MOORE, BY HER NEXT FRIEND, v. THE  
CONNECTICUT MUTUAL LIFE INSURANCE CO., OF HART-  
FORD, CONNECTICUT.

*Life Insurance—Representations as to health of insured—Dyspepsia—  
Personal injury not communicated—Attendance by physician.*

One M. obtained a policy of insurance on his life, issued and accepted on the conditions therein set out, one of which was that the answers in the application, which was made a part of the contract, were warranted by the assured to be true in all respects, and that if the policy had been obtained by any misrepresentation or concealment, it should be void. Among the questions and answers in the application were: 7. Have you ever had any of the following diseases: Dyspepsia? *Answer:* No. 8. Have you had any other illness, local disease, or personal injury? and if so of what nature? How long since? What effect on general health? *Answer:* No. 14. How long since you were attended by a physician? For what disease? Give name and residence of such physician. *Answer:* About thirty years ago—Lake fever—Dr. S. of, &c., now dead. Name and residence of your usual medical attendant. *Answer:* Dr. B., who attended my family, has known me some years. Have you reviewed the answers to the above questions, and are you sure that they are correct? *Answer:* Yes. At the end was a declaration and warranty that the above were fair and true answers to the questions; and an agreement that if there should be in any of the answers any untrue or evasive statements, or any misrepresentations or concealment of facts, the policy should be void.

The evidence shewed that the deceased about 14 or 15 years before had been thrown out of a sleigh, and sustained a fracture and loss of a portion of his skull, which, however, had not affected his general health: that his last illness occurred soon after a blow upon his head, received by striking against a bolt in his warehouse, and that during it he was trephined, when a new depression, arising from the old injury, was discovered, close to the seat of the new one: that he was a reckless rider, getting frequent falls: that he occasionally suffered from indigestion, but never in a chronic form; and that during the last ten years he had been attended by three physicians, besides Dr. B. above mentioned, but for trifling ailments only.

The jury, in answer to questions, found that the insured had not been afflicted with dyspepsia: that he had no personal injury which must have been present to his mind as something coming fairly within the term personal injury: that he had no serious or severe personal injury which through forgetfulness or inadvertence he did not communicate, nor any personal injury which he might fairly be expected to communicate for the defendants' information, or which had any effect on his general health.

*Held*, that the representations being clearly warranties, their truth and not their materiality was alone in question: that the answer to the seventh question was right upon the evidence; but that, notwithstanding and consistently with the answers to the other questions, the plaintiff could not recover, for, as to the eighth question, the insured was bound to mention an injury so serious and unusual as a fracture of the skull, whether it affected his general health or not. And as to the 14th question, the answer, that it was about thirty years since he had been attended by a physician, was clearly untrue. A verdict was therefore entered for the defendants.

THIS was an action by one of the children of the late Charles Moore, in his lifetime of the city of Toronto, merchant, to recover upon a policy of insurance for \$25,000 granted by the defendants on his life, the money being payable thereunder to the plaintiff as one of his children, for whose benefit the insurance was effected.

The declaration set out the policy, dated 27th March, 1875, and the conditions thereon endorsed, averred the death of Charles Moore, and that all conditions were fulfilled to enable the plaintiff to maintain the action.

Pleas :

1. Did not make the policy.

2. That the answer in the application for insurance, given in the negative by the said Charles Moore, to the question, "Have you had any other illness, local disease, or personal injury, and if so what nature? How long since? and what effect on general health?" was untrue; for that the said Charles Moore had, twelve years before he signed the application, received a blow on the head, which produced a fracture or depression of the skull, which was a personal injury within the meaning of the question, and the answer was a breach of the warranty contained in the application; and that by reason of such untrue answer the policy was void.

3. That the said Charles Moore had before the time when he made the application been afflicted with dyspepsia, and that the answer "No," given by the said Charles Moore to the question, "Have you had any of the following diseases (amongst others), dyspepsia?" was untrue and a breach of the warranty contained in the said application.

4. That the answer given to the question, "How long since you were attended by a physician?" namely, "about thirty years ago," was untrue, to the knowledge of the said Charles Moore, the said Charles Moore previous to the making of the application, and at a much shorter period than thirty years, having been attended by and consulted and availed himself of the skill of other medical men, to

wit, Dr. Lizars, Dr. Nicholl, Dr. Russell, and Dr. Valentine ; and that the answer was untrue and a breach of the warranty.

Issue.

The causes was tried at the last Spring Assizes for the county of York, before Moss, J., and a special jury.

The policy, and the application on which it was granted, were proved.

The policy was expressed to be "in consideration of the representations and declarations made to them (the defendants) in the application for this insurance," and of an annual premium in money, and was expressed to be issued and accepted upon several conditions and agreements, which were set out in the policy.

The only one, so far, as the policy is concerned, material to the decision of this case was the first, which was as follows :

"1. That the answers, statements, representations, and declarations contained in or endorsed upon the application for this insurance—which application is hereby referred to and made a part of this contract—are warranted by the assured to be true in all respects; and that if this policy has been obtained by or through any misrepresentation or concealment, then this policy shall be absolutely null and void; and further, that no answer, statement, representation, or declaration, made to any agent, solicitor, or any other person whatever, and not contained in said application, shall be taken or considered as having been made or brought to the notice or knowledge of this company, and this company shall be held and considered as having no notice or knowledge of such answer, statement, representation, or declaration; and the said application, a copy of which is hereto annexed, shall be taken and held to be and to contain the only answers, statements, representations, or declarations, made to this company in behalf of this insurance."

A copy of the application for insurance was annexed to the policy.

The portions of the application material, were as follow :

1. Name of the person whose life is proposed for insur-

ance?—Charles Moore. Occupation?—Wholesale merchant. Residence?—Toronto, county of York, Ontario.

7. Have you ever had any of the following diseases? Answer (Yes or No) opposite each. Apoplexy? No; Diphtheria? No; Fistula? No; Syphilis? No; Paralysis? No; Bronchitis? No; Piles? No; Rheumatism? No; Insanity? No; Spitting of blood? No; Affection of liver? —; Gout? No; Epilepsy? No; Habitual cough? No; Affection of spleen? —; Neuralgia? No; Habitual headache? No; Asthma? No; Fever and ague? —; Dropsy? No; Fits? No; Scarlet fever? No; Disease of the heart? —; Scrofula? No; Consumption? No; Dyspepsia? No; Palpitation? —; Small-pox? No; Pneumonia? No; Colic? No; Aneurism? —; Yellow fever? No; Pleurisy? No; Rupture? No; Disease of the urinary organs? —; Cancer, or any tumour? No.

8. Have you had any other illness, local disease, or personal injury? And if so, of what nature? How long since? What effect on general health? No.

14. How long since you were attended by a physician? About thirty years ago. For what disease? Lake fever. Give name and residence of such physician. Dr. Sampson, of Kingston, who is now dead. Name and residence of your usual medical attendant. Dr. Barrick, of Toronto, who attended my family, has known me some years. Name and residence of an intimate friend. Mr. Dunbar has known me years.

16. Have you reviewed the answers to the above questions, and are you sure that they are correct? Yes.

It is hereby declared and warranted that the above are fair and true answers to the foregoing questions; and that no statements respecting the physical condition, habits, personal or family history of the person whose life is proposed for insurance, other than those above made, have been made to any agent, solicitor, examiner, or other person, in behalf of the company; and it is acknowledged and agreed by the undersigned that this application shall form a part of the contract of insurance, and that if there be, in any of the answers herein made, any untrue or evasive statements, or any misrepresentations or concealment of facts, then any policy granted upon this application shall be null and void, and all payments made thereon shall be forfeited to the company. And it is further declared by



the undersigned, that the party making this application has an "insurable interest" in the life above proposed for insurance, to the full amount above applied for.

(Signed) CHARLES MOORE.

Dated at Toronto, this 22nd day of March, 1877.

Witness	}	(Signed)	JOHN HALDAN,
to the signing thereof		"	C. H. HALDAN.

The deceased last summer was going under one of the hoists in his warehouse rather quickly, and ran his head against a bolt. He was a little hurt at the time but did not appear to think much about it, but afterwards he became much worse. This was six weeks before his death. He died about 9th August, 1876. In his last illness he suffered from low fever with some head affection. Shortly before his death he was attacked with paralysis of the left side.

During his last illness he was trephined. On the occasion of the trephining there was a depression discovered in the skull on the parietal bone on the right side of the head. It was large enough for a person to put his little finger into. It had not the appearance of being a recent injury. On the contrary, the evidence shewed that about fourteen or fifteen years since he was thrown out of a sleigh, and sustained a fracture and loss of a portion of his skull. The injury of which he died was described to be alongside the seat of the former injury. In trephining, the edge of the instrument came close to the seat of the former injury. When the circular piece of bone, which the trephine took out, had been removed there was discovered about half a teaspoonful of pus lying between the bone and the dura mater. The death resulted from the suppuration, and the suppuration from the inflammation caused by the injury to the head. It was difficult to say if the former injury had at all contributed to the death.

It was proved that deceased had been a reckless rider, and one witness, a medical attendant, said "he rode at everything," and "was always getting falls." After the fracture of his skull he was thrown from his horse at a

hunt, but did not then sustain any injury. This was four or five years ago. The evidence shewed that his general health was not affected by the fracture of the skull. Indeed his general health appeared to be good up to the time he sustained the injury of which he died.

Occasionally he suffered from indigestion, but no witness would testify that he was dyspeptic. Some of the doctors described dyspepsia as being a settled form of indigestion. No witness swore that he was suffering from chronic indigestion.

It was proved that he was a man fond of changing his medical attendant, and that during the last ten years Dr. Lizars, Dr. Valentine, Dr. Nicholl, and Dr. Barrick, had been attending him and his family, at long intervals, for ailments, but so trifling as not to make any impression either on the minds of the doctor or of the patient.

Counsel for the defence, at the close of the case, submitted that there was no question for the jury—that the statements contained in the application were warranties, and shewn to be untrue in several particulars.

The learned Judge refused to nonsuit but left to the jury a number of questions, in order to obtain, if possible, answers which would cover all the points suggested.

These, with the answers, were as follows:—

1. Had Mr. Moore any personal injury which must have been present to his own mind as something coming fairly within the term “personal injury,” and which he did not communicate to the defendants? Ans. No.

2. Had he any serious or severe personal injury which through forgetfulness, or inadvertence, he did not communicate to the defendants? Ans. No.

3. Had he any personal injury which he might fairly be expected to communicate for the information of the defendants? Ans. No.

4. Had he any personal injury which had any effect on his general health? Ans. No.

5. Had he been afflicted with dyspepsia? Ans. No.

6. Had he been attended by a physician for any of the diseases detailed in the application? Ans. No.

7. Had he been attended by any physician but Dr. Sampson for any disease whatever, or only for some trifling ailments not amounting to a disease? Ans. No. Only for trifling ailments.

8. Did he give fair and true answers to the eighth question (repeating it)? Ans. Yes.

9. Did he give a fair and true answer to the fourteenth question? (repeating it.) Ans. Yes.

The learned Judge, thereupon entered a verdict for the plaintiff for \$3642.84, being the amount recoverable by plaintiff under the policy.

During this term, May 22, 1877, *M. C. Cameron*, Q. C., obtained a rule calling on the plaintiff to shew cause why the verdict should not be set aside, and a nonsuit or verdict entered for the defendants, pursuant to the Law Reform Act, or a new trial had between the parties, said verdict being contrary to law and evidence; and under the answer of the jury to the seventh question, that he had been attended by other physicians than the one named, though only for trifling ailments, which was virtually a finding for the defendants; and for misdirection of the learned Judge, in not directing the jury that on the evidence of the untruth of the answers to the eighth and fourteenth questions, they should find for the defendants.

During the same term, May 30, 1877, *Bethune*, Q. C., *Rose* with him, shewed cause. There was nothing to shew that the old injury on the head had in any manner impaired the general health of the assured, and without that the policy was not avoided: *Southern Life Ins. Co. v. Wilkinson*, 53 Geo. 535; *Insurance Company v. Wilkinson*, 13 Wallace 222. There was no evidence of dyspepsia, or of any of the other diseases specified in the seventh question: *The World Mutual Ins. Co. v. Shurltz*, 5 Big. 104; *Wheelton v. Hardisty*, 8 E. & B. 232, 241. The omission to name the other medical men who attended deceased for trifling ailments, cannot avoid the policy. Besides, the statements in the application contained are to be viewed only as representa-

tions and not as warranties: *Fitch v. American Popular Life Ins. Co.*, 5 Big. 316; *Fowkes v. The Manchester and London Life Ass. Co.*, 3 B. & S. 917, 3 F. & F. 440; *Jones v. The Provincial Ins. Co.*, 3 C. B. N. S. 65; *Anderson v. Fitzgerald*, 4 H. L. 484; *Campbell v. New England Mutual Life Ins. Co.*, 1 Big. 229, 251-2; *Bliss on Life Insurance*, 2nd ed., sec. 116.

May 31, 1877, *M. C. Cameron*, Q. C., contra. The fact that the assured had sustained a severe personal injury not disclosed to the company is not denied, and the contrary having been represented in the application the policy is void. Besides, the untrue answer to the fourteenth question must have the same effect. The statements in the application contained are clearly warranties, and if false in fact, whether through forgetfulness or otherwise, the policy is avoided: *Everett v. Desborough*, 5 Bing. 503; *Huckman v. Fernie*, 3 M. & W. 505; *Macdonald v. Law Union Fire and Life Ins. Co.*, L. R. 9 Q. B. 328. It is not clear but that the old injury was contributory to the death, and Dr. Wright, the medical referee of the company, says, had he known of it he would not have passed the life without making a special report to the company. But whether or not, as it appears that the answers were false in fact, the plaintiff cannot recover. The verdict, under any circumstances, must be entered for the defendants on the answer of the jury to the seventh question submitted by the learned Judge. The representation in the application is, that he had not been attended by a medical man for thirty years. The jury found in effect that during that time he had been attended by other medical men for trifling ailments. The evidence abundantly sustains the finding. Whether the ailments were trifling or not, there was an untrue representation.

June 30, 1877. HARRISON, C. J.—While the Court would desire to give every possible indulgence to a person placed in the position of the plaintiff in this suit, it is necessary to bear in mind that in every case of this descrip-



tion there shall be not only the purest good faith between the parties, but the most accurate representation of the facts deemed necessary by the insurance company for their information, before deciding whether to accept or reject the risk proposed.

The risk tendered is on the life of a human being. Whether the risk is to be deemed a good one or a bad one, must depend on some knowledge of the history of that life. The means of knowledge are the answers to questions put by the company to be answered by the applicant.

The answers to these questions may be mere representations as to facts, or such representations as in law to amount to warranties, and be not only a portion of the contract, but the basis of the contract of insurance.

Whether representations or warranties must depend on the form of the contract itself, construed in the light of decisions which disclose principles of construction applicable to particular classes of contract.

A warranty in insurance enters into and forms part of the contract itself. It defines by way of particular stipulation, description, condition or otherwise, the precise limits of the obligation which the insurers propose to assume. No liability can arise except within these limits. In order to charge the insurers, therefore, every one of the terms which define their obligation must be satisfied by the facts which appear in proof: Per Wells, J., in *Campbell v. New England Mutual Life Ins. Co.*, 1 Big. 229-237. See further, *Houghton v. The Manufacturers Mutual Fire Ins. Co.*, 8 Metc. 114; *The Glendale Woollen Co. v. Protection Ins. Co.* 21 Conn. 19; *Cooper v. Farmers' Mutual Ins. Co.*, 50 Penn. St. 299.

A representation, on the other hand, is no part of the contract of insurance. Its relation to the contract is usually described by the term collateral. It may be proved, although existing only in parol and preceding the written instrument. Unlike other verbal negotiations it is not merged in or waived by the subsequent writing: *Id.*

In *Wheelton et al. v. Hardisty et al.*, 8 E. & B. 239, in the

absence of some allegation that the answers to the questions put in the application were to be deemed and taken as a part of the contract, they were held only to be representations and not warranties.

The applicant in this case at the foot of the answers to the questions agrees that the application "shall form a part of the contract of insurance," and that "if there be in any of the answers herein made any untrue or evasive statements, or any misrepresentations or concealment of facts" then the policy to be granted on the application shall be void. Besides, the policy itself contains the declaration that the answers, statements, representations, and declarations contained in or endorsed upon the application for this insurance—which application is hereby referred to and made a part of this contract—are warranted by the assured to be true in all respects," &c.

The application and policy in this case are substantially the same as the application and policy in *Anderson v. Fitzgerald*, 4 H. L. 484, and upon the authority of that case we must hold that the representations in the application contained are warranties, and that being warranties their truth and not their materiality is all that we have to consider.

The latter case is now taken as deciding the law, not only in England but in the United States, where life insurance, like fire insurance cases, are more numerous than in England or any of her colonies.

In *Day v. The Mutual Benefit Life Ins. Co.*, 4 Big. 15, 22, MacArthur, J., said, "It seems to be now the settled doctrine in both countries that where the contract contains a stipulation that in case answers contained in the statement or application for insurance are untrue, the policy shall be void; that the falsity of the statements has the effect of avoiding the policy as their materiality is a matter of contract. See further, *Swick v. The Home Life Ins. Co.*, 4 Big. 176; *Conover v. The Massachusetts Mutual Life Ins. Co.*, Ib. 187; *Brennan v. The Security Life Ins. Co.*, Ib. 213; *Fitch v. The American Popular Life Ins. Co.*, 5 Big. 316;

*Foot v. The Ætna Life Ins. Co.*, Ib. 324; *Wright v. The Equitable Life Ass. Co.*, Ib 401.

This being so, the right of the plaintiff to recover is reduced to the enquiry whether "the answers, statements, representations, and declarations contained in and endorsed upon the application for insurance," are, as warranted by the assured, "true in all respects," for "if there be any untrue or evasive statements, or any misrepresentation or concealment of facts," the policy shall be void.

If the statements be untrue in point of fact, whether arising from ignorance or forgetfulness, still the policy must be held void: See *Duckett v. Williams*, 2 C. & M. 348; *Cazenove v. The British Equitable Ass. Co.*, 6 C. B. N. S. 437, affirmed 6 Jur. N. S. 826; *Fowkes v. The Manchester and London Life Ins. Co.*, 3 F. & F. 440, 3 B. & S. 917; *Perrins v. The Marine and General Travellers Ins. Co.*, 2 E. & E. 317; *Macdonald v. The Law Union Fire and Life Ins. Co.*, L. R. 9 Q. B. 328.

The language used in the policies in *Jones v. The Provincial Ins. Co.*, 3 C. B. N. S. 65; *Fowkes at al. v. Manchester and London Life Ins. Co.*, 3 B. & S. 917; and *Fitch v. The American Popular Ins. Co.*, 5 Big. 316, was so peculiar, and so qualified the warranties, as to make these cases no exceptions to the general rule, and in the main the language was so different from the language used in the application and policy here as to render them inapplicable to this case.

The defence, on the part of the company, is rested on the falsity of the answers to the seventh, eighth, and fourteenth questions.

The seventh question is as follows: "Have you ever had any of the following diseases?" Among others specified is dyspepsia. The answer was "No."

It appears to us that the evidence fails to establish any untruth in the answer to this question.

There was evidence that at times the assured, like many others now-a-days, suffered from indigestion, but there was no evidence that he was in such a state that he

could be called a dyspeptic. The question is not whether he ever suffered from the ailment called indigestion, but whether he ever suffered from the *disease* called *dyspepsia*. The latter must mean something more than an acute attack of indigestion arising from some temporary cause, and the medical men, so far as they were able to define it, were of that opinion. There appears from the evidence to be a chronic state of indigestion called and known as organic dyspepsia, which, if proved to have existed on the part of the assured, would certainly have avoided the policy.

In *Watson v. Mainwaring*, 4 Taunt. 763, 764, where the question was, whether *mere* dyspepsia is a disorder tending to shorten life, Chambre, J., said "All disorders have more or less tendency to shorten life, even the most trifling: as for instance, corns may end in a mortification. That is not the meaning of the clause: if dyspepsia were a disorder that tended to shorten life within this exception, *the lives of half the members of the law would be uninsurable.*"

In *The World Mutual Life Ins. Co. v. Schultz*, 5 Big. 104, where the question was, "Is the party subject to dyspepsia, dysentery, or diarrhoea," and the answer "No," the Court held that the fact that the assured six months to a year previous to insurance, "while afflicted with an abscess, was suffering like many people, from some degree of dyspepsia," was not evidence of a breach of warranty.

We cannot say that the jury in this case, in answer to the question "Had the assured been afflicted with dyspepsia," or as it might have been put, "with the *disease* called dyspepsia," were wrong in answering No. This answer appears to us to have been a very proper one on the evidence: See *Chattock v. Shawe et al.*, 1 Moo. & R. 498; *Ross v. Bradshaw*, 1 W. Bl. 312; *Wilkinson v. The Connecticut Mutual Life Ins. Co.*, 3 Big. 565; *Wise v. The Mutual Benefit Life Ins. Co.*, Ib. 595.

We may, therefore, dismiss the answer to the seventh question from consideration as a ground of defence.

We have more difficulty in dealing with the eighth question and the answer thereto.



The question is as follows: Have you *had* any other illness, local disease, or *personal injury*? And if so, of what nature? How long since? And what effect on general health? The answer is, No.

The plaintiff's counsel contends that this question applies only to illness, disease, or personal injury, which must be said to have had an injurious effect on general health. We do not see our way to adopt this contention. The enquiry is as to the past. The subjects of enquiry are three, viz., illness, local disease, and personal injury. Information is asked as to the nature of these, the date of them and the effect of them. While we do not think that it is incumbent on the applicant, under such a question, to answer as to every time his finger was cut—See *Geach et al. v. Ingall*, 14 M. & W. 95—we are unable to avoid the conclusion that it was the duty of the applicant under such a question to communicate the fact of a personal injury so serious as a fracture and loss of a portion of his skull. Such an injury is one of so unfrequent occurrence in this country that no man who has sustained it is likely to forget it when interrogated as to the history of his life. In this particular case, the personal injury in question may have—we do not say that it did—contributed to the death. But whether it did or not, we feel that it was the applicant's duty towards the insurers to have disclosed the fact, and allowed them to make enquiry about it. Their medical referee swore that if he had known it he would not have passed the life, but made a special report about it: See *Wise v. The Mutual Benefit Life Ins. Co.*, 3 Big. 595.

Plaintiff's counsel rely upon *Insurance Company v. Wilkinson*, 13 Wall 222, as an authority in their favour. The case was a singular one. The insurance was on the life of a female, who prior to the rebellion had been a slave. Among the questions put was, "Has the party ever had any *serious* illness, local disease, or personal injury." The answer was, "No." The defence shewed that in the year 1862, the assured had received a serious personal injury by falling from a tree, but that the fall did not in any man-

ner conduce to her death. The jury, in answer to the question, "Did Melinda Wilkinson, in the year 1862, receive a serious personal injury by falling from a tree? Ans. "Yes, injured, not seriously." And in answer to the question, "Were the effects of such temporary, and had these effects wholly passed away without influencing or affecting her subsequent health or length of life prior to the time when the application for insurance in this case was taken?" Ans. "Yes." And there was a verdict for the plaintiff. There was a motion against the verdict.

Miller, J., in delivering judgment, said, p. 230: "It is insisted by counsel for the defendant that if the injury was considered serious *at the time*, it is one which must be mentioned in the reply to the interrogatory, and that whether any further enquiry is expedient on the subject of its permanent influence on the health, is for the insurer to determine before making insurance. But there are grave and obvious difficulties in this construction. The accidents resulting from personal injuries, which at the moment are considered serious, are so very numerous that it would be almost impossible for a person engaged in active life to recall them at the age of 40 or 50 years; and if the failure to mention all such injuries must invalidate the policy, very few would be sustained where thorough enquiry is made into the history of the party whose life is the subject of insurance. There is, besides, the question of what is to be considered a serious injury at the time. If the party gets over the injury completely, without leaving any ill consequence, in a few days, it is clear that the serious aspect of the case was not a true one," &c.

It appears to us, with great respect, that the Court looked at the question as if it were, "Had she ever had a serious injury *which had an effect on her general health?*" The words in italics were no part of the question. It is, we think, more reasonable to suppose that the insurers desired to be informed of the serious personal injuries, and themselves preferred to decide after enquiry, whether they were so serious as to affect general health, and lessen the probabilities of life.

This was the view adopted by Coleridge, J., in *Southcombe v. Merriman et al.*, 1 Car. & Marsh. 286. It was there held that in an action on a life policy, where the rules of the society stipulated that the insured should be of sober and temperate habits, the defence, on proof that the habits of the deceased were intemperate must prevail, although it was proved that the intemperance was not such as to injure the health of the deceased or shorten his life.

Here we think it was incumbent on the applicant, in answer to the question put as to personal injuries, to have mentioned the fracture and loss of a portion of his skull. Had he done so the insurers might have asked as to the cause, and discovered that it was from recklessness in the use of horses, as described by one of the witnesses. Had defendants done so they would in all probability have refused to accept the risk. We cannot think it is any answer to say that in the judgment of the assured, or of any particular medical man, the injuries, although most serious, really did not in the long run seriously impair the general health of the insured.

The brain is the most tender and the most important of all the organs of human life. Because of its tenderness and importance, the Creator has protected it with the bony covering known as the skull. Every fracture of that skull must to some extent lessen the powers of resistance to external violence affecting the head. The fact of such a fracture is therefore one which ought to be communicated to persons proposing to insure the life thereby affected.

We respectfully dissent from the expression of opinion in *Insurance Co. v. Wilkinson*, 13 Wall. 222, so far as it can be said to be opposed to the opinion which we have in this case expressed. Being the decision of a foreign tribunal it can have no binding effect upon us beyond the point where the reasoning of it recommends it to our approbation.

We do not, however, rest our decision upon the answer to the eighth question.

Assuming that we should decide, or that some other

tribunal having authority to review our decision will decide contrary to our opinion, the question will arise as to the effect of the answer to the fourteenth question :

Q. How long since you were attended by a physician? For what diseases? Give name and residence of physician?

Ans. About thirty years ago. Lake fever. Dr. Sampson, of Kingston, who is now dead. Then follow: Name and residence of your *usual* medical attendant? Ans. Dr. Barrick, of Toronto, who attended my family.

The question is not "how long since you were [first] attended by a physician," but "how *long since* [*i.e.*, how recently] were you attended by a physician?" The answer "about thirty years" to such a question is calculated to induce an insurance company to imagine that the life is an unusually good one. But it is argued that the word "since," could not have been used in the sense of recent, because of the subsequent enquiry, "name and residence of your *usual* [not present] medical attendant?" Now a man having a family and a physician habitually to attend his family, including himself when necessary, may give the name of a physician as being his usual medical attendant, although such attendant was never under any necessity to prescribe for himself. And this, in truth, appeared on the evidence to be the real position of Dr. Barrick, the physician whose name was given as being that of the "usual" medical attendant. The last attendance may have been by a physician *other* than the usual medical attendant. The name of that physician, if any, in addition to that of the usual medical attendant, is therefore required. The argument as to the uncertainty of the question cannot be allowed to prevail against the plain and obvious meaning of the words used in the first part of the question, especially as in the sixteenth question the applicant was asked to *review* the answers to the questions, and be sure that they were correct.

We do not see anything equivocal in the language of the question so as to bring the case under the authority of *World Mutual Life Ins. Co. v. Schultz*, 5 Big. 104, cited on behalf of the plaintiff.



Now was the answer to the question true. The contrary was proved. During the thirty years mentioned the assured had been several times thrown from his horse. On one occasion he was so much injured that he sustained a fracture of the skull, and must have been attended by a physician. On another occasion he was attended by Dr. Lizars for a disease, which, although not one of the diseases specified in the seventh question, was of such a nature as to demand the services of a physician. Time and again medical men prescribed for ailments. The company have in our opinion, good ground to complain that they were actually misled by the answer to the question, whether the misleading was designed or not.

Of all the questions put by an insurance company as to a proposed life risk, the one as to medical attendance last and usual, in our present state of civilization, is one of the most important. These attendants may have and sometimes do have information as to their patients, which is only known to themselves and their patients (and may not be even known to their patients) and yet of the greatest value to proposed insurers.

In *Morrison v. Muspratt et al.*, 4 Bing 60, 62, Best, C. J., said, "All insurance offices are desirous to consult with the medical man who has been *last* in attendance on the life insured." And the Court in that case set aside the verdict because of the omission of the insured to disclose the name of the *last* medical attendant.

This was followed by *Everett v. Desborough*, 5 Bing. 503; *Huckman v. Fernie*, 3 M. & W. 505; *Hutton v. Waterloo Life Ass. Co.*, 1 F. & F. 735, somewhat similar cases, with similar results.

Where the answer to such a question is deceptive, whether there was an intention to deceive or not, the policy is clearly void: *Cazenove et al. v. The British Equitable*, 6 C. B. N. S. 437, 6 Jur. N. S. 826; *Bliss* on Life Insurance, 2nd ed., sec. 125; *Burritt v. The Saratoga County Mutual Fire Ins. Co.*, 2 Bennett 276.

While acquitting the deceased of all imputation of inten-

tional wrong, we are obliged, according to our understanding of the contract between the parties, to give effect to so much of the defence as rests on the falsity of the answers to the eighth and fourteenth questions.

The learned Judge in this case, instead of asking the jury to render a general verdict either for the plaintiff or the defendants, asked them to answer certain questions. Upon their answers to these questions, he entered the verdict for the plaintiff. The verdict therefore was, under 37 Vic. ch. 7 sec. 32, O., the verdict of the Judge and not of the jury : *Mann v. English*, 38 U. C. R. 240, 254. We are of opinion on the answers to the questions taken in connection with the undisputed facts of the case, that the verdict should have been entered for the defendants on the issues joined on the second and fourth pleas, and for the plaintiff on the remaining issues.

We see no object, therefore, in directing a new trial in order that the opinion of a jury may be taken on the question whether or not the insured had sustained a personal injury by fracture of his skull, which was not communicated by him to the defendants, or to ask them if, in their opinion, he was attended by a physician within thirty years of his application for insurance.

These questions in their naked form were not submitted to the jury, we suppose for the reason that as facts there was no dispute about them, and the Court were left to decide the effect of the answers of the jury to the questions submitted, taken in connection therewith.

Even if the verdict were looked upon not as the verdict of the Judge, but of the jury, and the case were before us on a motion to enter a nonsuit or verdict for defendants, we apprehend it would be our duty in this case to enter a nonsuit or verdict for defendants : *Campbell v. Hill*, 22 C. P. 526, 23 C. P. 473 ; *Bradley v. Brown et al.*, 39 U. C. R. 463.

We do not in any respect intend to disregard the answers of the jury to the questions submitted to them, but consistently with their answers we are of opinion,

on the whole case, that the defendants are entitled to succeed.

The rule to be followed in such a case was, we think, correctly laid down by Mr. Justice Mellor, in *Hollins v. Fowler*, L. R. 7 H. L. 757, 772, where he said: "The reservation is in the nature of a convention between the Judge, jury, and the counsel, that instead of a general verdict being taken, specific questions shall be asked of the jury, and if they answer them the verdict shall nevertheless be entered for the plaintiff or defendant, as the case may be, subject to the opinion of the Court out of which the record comes, upon the answers to these questions either alone or in connection with the several facts of the case, but with this bargain, that the answers of the jury embodying the inferences which they have drawn are to bind the parties as being the true inferences to be drawn from the facts involved in the questions, and thus control the Court in considering how the verdict shall be ultimately entered."

It is now declared by 37 Vic. ch. 7 sec. 33, O., that "Every verdict shall be considered by the Court, in all motions affecting the same, as if leave had been reserved at the trial to move in any manner respecting the verdict, and in like manner as if the assent of parties had been expressly given for that purpose": See *Bank of British North America v. Simpson*, 24 C. P. 354, 361; *Cammell v. The Beaver & Toronto Mutual Fire Ins. Co.* 39 U. C. R. 1, 11; *Hughes v. Canada Permanent Building Society*, 39 U. C. R. 221.

The jury, in answer to the questions submitted to them, did not find that the deceased had received no personal injury of the character which we have mentioned, but that the deceased had no personal injury *which must have been present to his mind, as something coming fairly within the term personal injury*; that he had no *serious or severe* personal injury *which through forgetfulness or inadvertence* he did not communicate; that he had no personal injury *which he might fairly be expected to communicate for the information of the defendants*; and that he had not any personal injury *which had any effect on his general health*.

The evidence beyond dispute shews that he had such an injury, and although not present to his mind at the time of his application, although through forgetfulness, or inadvertence, he omitted to mention it, although it had no effect on his general health, yet we think, as a matter of law, that it was his duty under the contract to have communicated it, and that the qualifying circumstances suggested by the questions are not sufficient to excuse him under the contract.

It is not as if there were a dispute about the fact of the injury, and the jury against evidence, or the weight of evidence, had found there was no such injury : See *Ex parte Morgan*, L. R. 2 Ch. D. 72, 99.

Notwithstanding the answers of the jury to the questions submitted to them, we are of opinion that the verdict must be entered for the defendants on the issue joined to the second plea.

We are, for similar reasons, of opinion that the verdict must be entered for the defendants on the issue joined to the fourth plea.

The verdict will stand for the plaintiff on the issues joined on the remaining pleas.

Rule absolute to enter verdict for defendants on the second and fourth issues.

MORRISON, J., and WILSON, J., concurred.

*Rule accordingly.*

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## BULLIVANT V. MANNING.

*R. W. Co.—Consol. Stat. C. ch. 66, sec. 80—Conditional subscription for shares—Liability of subscriber to creditors.*

The plaintiff, as a creditor of a railway company, sued defendant as a shareholder, for the amount remaining due on his shares. Defendant pleaded that it was agreed between defendant and the company that if he would sign an agreement to take the shares the company, would give him a contract for the construction of the railway then to be constructed, and that unless and until the contract should be so given defendant should not be bound by the agreement or become thereby a shareholder; and in pursuance of said agreement, and not otherwise, defendant signed the agreement. And defendant alleged that, without any default on his part, the company refused to give him the contract, and gave it to another; and that, except as aforesaid, he never subscribed for or became the owner of the shares.

In another plea, defendant alleged that he did subscribe for the shares on the same agreement; and that until the contract should be given to him he was not to be bound by such subscription: that the contract was given to another (as in the former plea); and that defendant had never paid, nor been asked to pay, anything on the shares, nor had he been recognized, or treated, or done any act as a shareholder in respect of said shares; and that, other than as aforesaid, he never subscribed for or became the owner of said shares.

*Held*, on demurrer, by MORRISON, J., and affirmed by the full Court, that both pleas were good, as shewing that defendant never became a shareholder so as to be liable to creditors, there being here no such provision as in the English Companies Act of 1867, requiring such agreements to be registered in order to bind creditors.

**DECLARATION.** The plaintiff, as an unsatisfied judgment creditor of the Toronto Grey and Bruce Railway Company, sued the defendant, who was alleged to be the holder of and entitled to fourteen shares in the capital stock of the said company, whose name had been entered on the list of such shareholders kept by the company under the Act of Parliament in that behalf as the person entitled to the shares in the said company and each of them, and upon which shares there still remained on and in respect of each of the shares the sum of one hundred dollars, together with interest from the first of January, 1875.

The defendant pleaded several pleas. The fourth, sixth, and seventh were demurred to. The fourth plea was given up on the argument.

The sixth plea stated that it was agreed between the defendant and the company, that if the defendant would

sign an agreement to take the said shares the company would give and award to the defendant a certain contract for the construction of the railway of the company then to be constructed, and that unless and until the said contract should be so given and awarded to the defendant he should not be in anywise bound by his so signing the said agreement to take the said shares, or be or become thereby a shareholder in the capital stock of the company; and in pursuance of the said agreement, and not otherwise, the defendant signed the agreement to take the said shares. And without any default on his part and although he requested the company to give and award the said contract to him, the company refused so to do and gave it to another; and other than as aforesaid the defendant never did subscribe for or otherwise become entitled to or the owner of the said shares or any of them.

Seventh plea, that it was agreed between the defendant and the company, that if the defendant would subscribe for the said shares the company would give and award the defendant a contract for the construction of the railway of the company then to be constructed, and that unless and until the said contract should be so given to him the defendant should not be in anywise bound by such subscription by him, or be or become thereby a shareholder in the capital stock of the company; and in pursuance of the said agreement and not otherwise the defendant did subscribe for the said shares, and without any default on his part, and although he requested the company to give him the said contract, the company refused so to do and gave it to another. And the defendant has never paid any money on the shares or any call in respect of them, nor has he ever been requested by the company to do so, nor has he ever been recognized or treated or in any manner dealt with by the company or done any act in the capacity of a shareholder in respect of the said shares, and other than as aforesaid he never did subscribe for or otherwise become entitled to or the owner of the said shares or any of them in the said capital stock.

Demurrer to the sixth and seventh pleas. Because the pleas do not allege that the plaintiff was a party to the agreement therein referred to, and they confess the cause of action and do not avoid it. Because it is not shewn the defendant has ceased to be a subscriber and stockholder, or that he has had his name removed from the list of subscribers, or that he has taken any steps to have his name removed from the said list. And that the agreement in the said pleas mentioned did not exempt the defendant from his liability as a stockholder.

Joinder.

The case was argued October 13, 1876, by *J. E. Robertson*, for the demurrer, and *Bain*, contra, before Morrison, J., sitting for the Court, who verbally gave judgment for the defendant on October 17, 1876.

From this judgment the plaintiff appealed.

In Michaelmas Term, December, 7, 1876, the appeal was heard.

*J. E. Robertson* for the demurrer, cited the following cases: *Oakes v. Turquand*, L. R. 2 H. L. 325; *Re Mason's Hall Tavern Co.*, *Habershon's Case*, L. R. 5 Eq. 286; *Re Canadian Native Oil Co.*, *Fox's Case*, L. R. 5 Eq. 118; *Re Anglo-Danubian Steam Navigation and Colliery Co.*, *Walker's Case*, L. R. 6 Eq. 30; *Re Pen 'Allt Silver Lead Mining Co.*, *Fothergill's Case*, L. R. 8 Ch. 270; *Benner v. Currie*, 36 U. C. R. 411; *Ryland v. Delisle*, L. R. 3 P. C. 17; *Port Whitby and Port Perry R. W. Co. v. Jones*, 31 U. C. R. 170; *Moore v. Gurney*, 21 U. C. R. 127, 22 U. C. R. 209; *Moore v. Murphy*, 11 C. P. 444; *McIntyre v. McCracken*, 37 U. C. R. 422—reversed in appeal, 1 App. 1 (a); *Henderson v. Royal British Bank*, 7 E. & B. 356.

*Ferguson*, Q. C., contra. If the judgment given in *Gwatkin v. Evans*, (b) is right, the pleas are good. That case is not reported.

(a) This case was carried to the Supreme Court, where the judgment in Appeal was reversed.

(b) See remarks of Wilson, J., post p. 526.

June 30, 1877. WILSON, J.—The sixth plea is a traverse of the declaration, which alleges the defendant was a shareholder. The plea says otherwise than as in the plea mentioned he was not a shareholder.

The plea says the defendant signed an agreement to take the shares. It does not admit he ever took the shares. It is therefore a mere traverse with special circumstances, leaving it for the Court to judge whether these facts do or do not shew the defendant ever became a shareholder as the plaintiff has alleged. I am of opinion that signing an agreement to take shares is not the taking of shares; but a basis merely upon which the shareholder might be ordered by a decree of specific performance to take them, or to perfect the contract. The plea, it appears to me, is sufficient on that ground. If it go beyond that it must be the same in effect as the seventh plea.

The seventh plea admits the defendant did subscribe for the said shares. It then alleges the facts upon which the shares were taken: that it was conditional upon the company giving him the contract to build the railway, and that unless and until the contract should be given to him, he should not be bound by his subscription, or he or become a shareholder; and he says the company, without any default of his, broke their agreement, and that he never dealt with the shares in anyway, and he has not been treated by the company as a shareholder; and he says if these facts do not make him a shareholder then he is not one. The plaintiff asserts that they do constitute him a shareholder. The defendant maintains the contrary.

I have had a good deal of difficulty in forming an opinion in this case, and I have not always been of the same opinion.

The plain declaration of the Legislature to make the shareholder liable to the creditors of the company "to an amount equal to the amount unpaid on the stock held by him for the debts and liabilities thereof, and until the whole amount of the stock has been paid up," is a strong reason for holding the person who is actually a shareholder liable to the creditors of the company to the full amount



of his unpaid stock "until the whole amount of his stock has been paid up," and for holding that anything short of an actual payment of the stock shall not be available to the shareholder against the demand of a creditor, and for holding that the subscription for so much stock is an engagement, so far as the creditors are concerned, to pay for that stock in cash, unless there is something which shews that the agreement of the stockholder is of a different character.

But I have come to the conclusion that a special bargain may be made in this country on the taking of stock which need not be noted so as to be brought to the notice of creditors, and that it will be an answer to the action of a creditor if it would be a defence to an action by the company: Consol. Stat. C. ch. 66 secs. 80-112, apply to this case; they are different from the enactments of the English statutes.

The law of ordinary partnerships does not properly apply to corporate bodies; for "holding one's self out as a partner," or "ostensible partnership," can scarcely ever be said to arise in such cases. And the different English decisions upon the subject, and the distinguishing facts in each case have to be carefully considered.

In England since the Companies Act of 1867, ch. 131, such a collateral agreement as between the shareholder and a creditor is of no avail unless it is duly registered under the 25th section of that Act, and until that provision is adopted in this country there will be no sufficient protection afforded to the creditors of the company.

As between the company and the defendant that conditional arrangement is binding and valid.

As between the person who is sued as a shareholder and the creditor it will also be binding, certainly if the person so sued has never become a shareholder: *Re Peninsular West Indian, and Southern Bank, Austins' Case*, L. R. 2 Eq. 435; *Re Rolling Stock Company of Ireland, Shackelford's Case*, L. R. 1 Ch. 567; but if he has become a member such a collateral agreement will not prevent a

creditor from holding him individually liable, according to the following cases :

In *Re Richmond Hill Hotel Co., Elkington's Case*, L. R. 2 Ch. 511, Lord Cairns, L. J., at p. 522 said, " Now it seemed to me, throughout the argument, that the real point for determination in this case might be said to be this, did Messrs. Elkington intend and agree to become members and shareholders *in præsentia*, with a collateral agreement as to what should be the effect of their so becoming shareholders? or, on the other hand, did Messrs. Elkington agree that if and when a certain preliminary condition should be performed, and not otherwise, they would become members and shareholders." And from the facts of that case it was determined that the Messrs. Elkington had become members of the company *in præsentia*. See also *Re Canadian Native Oil Co., Fox's Case*, L. R. 5 Eq. 118 ; *Re Woollaston's Case*, 4 DeG. & J. 437.

There are several cases which shew that such agreements between the company and the shareholder are valid : *Re Pen 'Allt Silver Lead Mining Co., Fothergill's Case*, L. R. 8 Ch. 270.

It is admitted that an agreement made before the Act of 1867, that shares taken in payment of property sold to the company were valid, if the agreement were clearly proved. That view of the law did not apply to the case of *Fothergill*, just mentioned, firstly, because his case came under the Act of 1867 and his special agreement had not been registered ; and secondly, because it was held the agreement which he set up had not been proved. But several cases there mentioned shew that such an agreement before the registration clause was passed were held to be valid.

The Lord Chancellor at p. 277 said, " In the then state of the law" (before the Act of 1867) " this mode of paying up shares was held, (and I suppose rightly held, if the transaction was *bonâ fide* and the agreement really of that nature,) to be lawful and effectual." And at p. 279, he said, " If there were in this case the clearest possible proof, either by parol evidence or by any unregistered document,

of an actual agreement that the shares which Mr. Fothergill subscribed for should be paid up by setting off against his liability on them the value of his interest under the agreement for sale in that part of the consideration for the mine sold to the company which was not payable in cash, this agreement, (not being registered,) would be absolutely void by the statute."

Sir W. M. James, L. J., at p. 281 said, "It appeared to me in *Jones's Case*, L. R. 6 Ch. 48, that the same state of things arose, for that the conduct of the parties there was evidence of a *bona fide* arrangement by persons competent to make that arrangement, that one set of shares should be set off against the other."

Sir G. Mellish, L. J., at p. 281 said, "I do not think it necessary, and do not desire to give any conclusive opinion whether, if the Act of 1867 had never passed, there would not in this case have been sufficient evidence of a verbal agreement between Mr. Fothergill and the directors of the company that 1000 of the paid up shares \* \* allotted to Mr. Fothergill should be taken and accepted in lieu and satisfaction of the payment up of the £2000 due on the 1000 shares which Mr. Fothergill had subscribed for under the memorandum of association."

In *Re Rolling Stock Co. of Ireland, Shackleford's Case*, L. R. 1 Ch. 567, Shackleford applied for shares and proposed to pay for them, excepting as to £2000 which he paid in cash, in furnishing of rolling stock. His name was entered as a shareholder. Before the matter went further he applied for and got his money back, and it was held his name should not be put upon the list of shareholders, because the bargain had not been completed with him. He had applied for shares upon a special proposition, and the company had not accepted it, but entered his name generally as a shareholder, that is as one who was to pay for his shares all in cash, and that he never assented to, and while the transaction stood in that way it was put an end to.

But Wood, V. C., in his judgment at p. 570, note 1, in speaking of the proposition made by the shareholder, said,

"Assuming it to be competent to the company to allot shares on these terms (and I do not know that there would be anything illegal in their doing so, and entering a minute as to the terms on which the shares were to be held) they were at liberty to accept his offer, or not."

Sir G. Turner, L. J., at p. 574, said: "I think, according to the true meaning of the letter and the correspondence taken together, it must be considered as merely giving them authority to put his name upon the register on the terms contained in his letter, which were that on the shares which he had taken in the Rolling Stock Company he should not be called upon to pay in money."

In *Re Aldborough Hotel Co., Simpson's Case*, L. R. 4 Ch. 184, Simpson agreed to take 300 shares in the Hotel Company, as soon as he was satisfied that 1,500 shares, including his, had been taken, and that the directors had passed a resolution that he should have the contract for the alterations. The calls for the shares were to be set off against the amount due on the contract. The directors accepted the proposal and passed a resolution to the effect required. Simpson's name was entered on the register; he got his allotment of shares, and he paid the deposit. The certificates were not delivered to him, and he was not called on to pay any calls. He afterwards attended two meetings of shareholders, to see if the contract was secured to him. No contract for alterations was ever prepared, and the company was soon after wound up. Held, affirming the decision of the Master of the Rolls, that the contract to take the shares was conditional on Simpson's getting the contract; that the condition was not performed by the mere passing of the resolution; and that he had not waived the condition by not returning the notice of allotment, or by attending the meeting of shareholders. See, also, *Re Universal Banking Co., Rogers's Case*, L. R. 3 Ch. 633.

In *Re Paraguassu Steam Tramroad Co., Black & Co.'s Case*, L. R. 8 Ch. 254, Black & Co. agreed with the company to supply them with the engines which they required



for ten years : that the company for each of the first five years should accept at least four engines, and for each of the next two years, two engines : that the first order was to be for two engines : that the engines should be paid for when the delivery notes were presented : that instead of paying cash the company might give acceptances : that Black & Co., by themselves or their nominees should subscribe for at least 198 shares, and should pay in cash £6 per share, and no further payment of calls should be enforced in respect of the shares until at least two engines had been paid for as provided : that during the agreement Black & Co., might set off against the calls the amount which was due to them ; and that the company should pay by way of liquidated damages £500 for each engine which they should order and not accept.

Black & Co., made two engines, which the company did not accept. It was held, reversing the decision of Bacon, V. C., that as the statute prevented a set-off being pleaded by a shareholder to calls made upon him, that he could not contract to overrule the statute in that respect as against creditors.

The Lord Chancellor, pp. 258, 259, said : The agreement mentioned "is not the contract between himself and the company under which he was constituted a shareholder, but is a collateral and preliminary contract, though no doubt made in the expectation of his becoming a shareholder. \* \* In this case, putting the argument \* \* at the highest, it would be simply this, that we ought to set up an equity to rescind and avoid the contract for shares, on the ground that the consideration for that contract had more or less failed. In *Oakes v. Turquand*, L. R. 2 H. L. 325, the House of Lords held that down to the very day of winding up, the contract was voidable at the option of the parties. But they further decided, that the option not having been exercised so as to avoid the contract before winding up, it then ceased to be capable of being avoided as against creditors ; and putting the argument of the respondents at the highest, it could not be carried beyond

that point. This is a question with creditors and with creditors only, and it arises after the winding-up, no attempt having been made to have their names withdrawn from the register before the commencement of the winding-up."

Sometimes a question arises whether the agreement was that the party should become a shareholder, or be considered as one so far as the public were concerned, or whether the taking of shares was conditional only: *Re General Provident Assurance Co., Bridges's Case*, L. R. 5 Ch. 305.

I may add that the position of a creditor towards the company and the shareholders is just the same since the Act of 1862, as it was before under the earlier Acts; and therefore the case of *Henderson v. The Royal British Bank*, 7 E. & B. 356, is as applicable since the Act of 1862 as it was under the statutes which were then in force: *Oakes v. Turquand*, L. R. 2 H. L. 325, per Lord Chelmsford, C., p. 347; *Re Overend, Gurney & Co., Ex parte Oakes & Peek*, L. R. 3 Eq. 576, per Malins, V. C., p. 632.

In *Black's Case*, just mentioned, the parties were fully shareholders with an agreement that beyond £6 per share, which they had paid, they were not to be liable for any calls, but that against such calls they should be at liberty to set off any demand which they had against the company; and it was held they could not do by the statute.

*Re China Steamship and Labuan Coal Co., Drummond's Case*, L. R. 4 Ch. 772, decided that the subscriber for shares may shew that these shares are to be treated as paid-up shares, or that they are payable in stock which he had in another company, whose business this latter company was buying out.

*Re Baglan Hall Colliery Co.*, L. R. 5 Ch. 346, is to the same effect.

The case of *Gwatkin et al. v. Evans*, decided in this Court upon issues in fact, was, that the evidence shewed the pleas setting up a special agreement as to the payment of the shares was proved. No matter of law was decided in that case.

In principle, and there does not seem to be in law,

any reason why a shareholder may not stipulate with the company when and in what manner he shall pay for his shares. And the Companies Act passed in 1867 shews that the law was considered to be so, otherwise there would have been no necessity for passing that Act requiring all such agreements to be registered in order to be valid against the creditors of the company. I have come therefore to the conclusion that in this country where we have no such statute, the agreement, which, as before mentioned, must on these pleadings be deemed to be in such form as will make it perfectly binding between the defendant and the company, is a valid contract also as against the creditors of the company.

In my opinion, then, the judgment should be for the defendant on the demurrer to the seventh plea also.

Judgment for defendant on the demurrers to the sixth and seventh pleas, and for the plaintiff on demurrer to the fourth plea.

HARRISON, C. J.—I am of opinion that the decision of my brother Morrison must be affirmed.

The defendant is sued as a shareholder of unpaid stock in the Toronto, Grey, and Bruce Railway Company.

His sixth plea is, that he did not become a shareholder otherwise than by an agreement between himself and the company, that *if* he would sign an agreement to take shares the company would give to him a contract for the construction of the railway of the company then to be constructed and built, and that *unless and until the contract should be given him, the defendant was not to be bound by the agreement to take shares*, or thereby become a stockholder in the capital stock of the company; that relying on the promise of the company the defendant signed the agreement to take shares, but the company afterwards refused to give the contract to the defendant, and awarded the same to another.

His seventh plea alleges, in addition, that the defendant was never requested by the company to pay money on the

shares, or recognized or treated by the company as the holder of shares in the capital stock of the company.

The plaintiff by demurring to these pleas for the purposes of argument admits their truth, and submits to the Court for decision whether in law they are respectively sufficient.

The question is, whether a person whose only agreement to take stock was a conditional one, can, where the company has refused to perform and has incapacitated itself from performing the condition precedent, be treated as a shareholder by a creditor of the company, and made to pay the amount of stock as if the same had been subscribed without condition of any kind.

The Act incorporating the Toronto, Grey, and Bruce Railway Company incorporates the clauses of the Railway Act of the Consolidated Statutes of the late Province of Canada with respect to "shareholders:" 31 Vic. ch. 40, sec. 2, O.

The Consolidated Statute contains no definition of what is necessary to constitute a "shareholder." It, however, provides sec. 80, that "each shareholder shall be individually liable to the creditors of the company to an amount equal to the amount unpaid on the stock held by him, for the debts and liabilities thereof, and until the whole amount of his stock has been paid up; but shall not be liable to an action therefor before an execution against the company has been returned unsatisfied in whole or in part," &c.

The special Act, 31 Vic. ch. 40, provides that "On the subscription for shares of the said capital stock each subscriber shall pay forthwith to the directors for the purposes set out in this Act ten per cent. of the amount subscribed by him," &c., and "thereafter calls may be made by the directors for the time being as they shall see fit, provided that no calls shall be made at any one time of more than ten per cent. of the amount subscribed by each subscriber." Secs. 27, 28.

Now, what is the effect of a conditional agreement to



take stock, and the condition not performed by the company, on the position of the so-called shareholder? In order to constitute any person a shareholder, in the absence of some statutable definition on the subject, there must be proof of an agreement between him and the company that he shall unconditionally become and be a shareholder. See *Brown's Case*, L. R. 9 Ch. 102; *Portal v. Emmens*, L. R. 1 C. P. D. 201; *Metropolitan Public Carriage and Repository Co., Du Ruvigiles' Case*, 36 L. T. N. S. 329.

The foundation of the liability is contract, and the contract is not in general to be stretched beyond the actual agreement of the parties.

The only offer made by defendant to accept shares in the company was, according to the pleadings, accompanied by the condition that he should receive the contract for the construction of the line of railway. Either that offer was accepted by the company in the terms in which it was made or it was not. If it was not accepted there was no contract, and defendant is not to be deemed a shareholder: *The Oriental Inland Steam Co. v. Briggs*, 4 DeG. F. & J. 191. If it was accepted it was accepted on the terms on which it was made, and as there was no performance of the condition precedent, the agreement to take stock never took effect, either as regards the company or a creditor: *Re Sunken Vessels Recovery Co., Wood's Case*, 3 DeG. & J. 85; *Re Richmond Hotel Co., Pellatt's Case*, L. R. 2 Ch. 527; *Re Rolling Stock Co. of Ireland, Shackelford's Case*, L. R. 1 Ch. 570, note, affirmed by the Lords Justices, *Ib.* 567. See also *Re Universal Banking Co., Harrison's Case*, L. R. 3 Ch. 633; *Rogers's Case, Ib.* 634, 637; *Re Aldborough Hotel Co., Simpson's Case*, L. R. 4 Ch. 184.

The effect of conditional agreements to take stock was considered in *Moore et al. v. Gurney et al.*, 22 U. C. R. 209, and *Woodruff et al. v. Corporation of the Town of Peterborough, Ib.* 274. Neither of these cases is, however, in point on the question now before us.

The contest in the cases bearing on the point is, whether

the agreement on the part of the company was conditional to the operation of the agreement to subscribe, or collateral thereto. This was the contest in *Re Richmond Hill Hotel Co., Elkington's Case*, L. R. 2 Ch. 511. Vice-Chancellor Wood held the agreement conditional, and that Messrs. Elkington, without performance of the condition precedent on the part of the hotel company to take electro plate from Messrs Elkington, were not to be deemed contributories. The Lords Justices were of a different opinion, and reversed the decision of the Vice-Chancellor.

Lord Cairns in *Richmond Hill Hotel Co., Pellatt's Case*, L. R. 2 Ch. 527, 534, in speaking of *Elkington's Case*, said : "The Court considered that there were two agreements ; the first constituted by an actual application for and allotment of shares, followed by acceptance of them, by which agreement Messrs. Elkington were made shareholders ; and a collateral agreement, which might or might not be valid, as to setting off the price of goods supplied against calls."

In *Pellatt's Case* the agreement was to take fifty shares of £10 each, on the faith of an agreement that Pellatt should receive orders for goods to the extent of at least £1,000; and this was held not only by Vice-Chancellor Wood, but by the Lords Justices, to be a conditional subscription for stock.

The case which on the facts approaches nearest to the one now before us is *Re Aldborough Hotel Co., Simpson's Case*, L. R. 4 Ch. 184. Simpson, a builder, wrote a letter to the directors of an hotel company, stating that in consideration of the contract for making the alterations at the hotel being secured to him, he would subscribe for and take 300 shares in the company, and pay the deposit as soon as he was satisfied that 1500 shares, including his, had been subscribed for, and that the directors had passed a resolution that he should have the contract for the alterations. The directors accepted the application in the terms of the letter, and passed a resolution to that effect. No contract for alterations was ever prepared, and shortly afterwards

the company was wound up voluntarily. It was held that the contract to take shares was conditional: that the condition was not performed by the mere passing of the resolution that Simpson should have the contract; and therefore that Simpson was not a contributory.

Cases where, instead of there being a conditional subscription or conditional agreement to subscribe, there is an actual unconditional subscription for stock and a mere right to set off one cause of action against another, have no application to the point now before the Court: *Macbeth v. Smart*, 14 Grant 298; *Re Paraguassu Steam Tramroad Co., Black's Case*, L. R. 8 Ch. 254; *Benner v. Currie*, 36 U. C. R. 411; *McGregor v. Currie*, 26 C. P. 55.

Nor have the cases cited where the person sued had become a stockholder, but was induced to do so by fraud, and had not repudiated the contract until sued by a creditor, or until the company had been placed in liquidation. They are plainly distinguishable. In such cases the party sued admits that he became a shareholder, and it is incumbent on him to shew that before the rights of the creditor accrued he had got rid of the liability by repudiation or otherwise. Where a contract is voidable but not void, it remains valid till it is rescinded. A contract induced by fraud is not void but voidable, and although the persons who by their fraud induced it cannot, as against a proper defence, enforce it, other persons may in consequence of the contract acquire interests and rights which they may enforce against the person who has been without their knowledge fraudulently induced to enter into the contract: *Re Canadian Native Oil Co., Fox's Case*, L. R. 5 Eq. 118; *Walker's Case*, L. R. 9 Eq. 20; *Central R. W. Co. of Venezuela v. Kirsch*, L. R. 2 H. L. 99; *Oakes v. Turquand et al.*, *Ib.* 335; *Reese River Silver Mining Co. v. Smith*, L. R. 4 H. L. 64.

In my opinion the facts disclosed in the sixth and seventh pleas of the defendant, shew that the defendant never became a shareholder in the capital stock of the Toronto, Grey, and

Bruce Railway Company, so as to be liable to be sued by creditors as the holder of unpaid stock in that company.

The decision must be affirmed, with costs.

MORRISON, J., concurred.

*Judgment affirmed.*

### DAWSON V. GRAHAM.

*Lease—Agreement to renew—"Release"—Construction of—Mistake—Reformation of agreement—Assignment of chose in action—35 Vic. c. 12, O.*

On 1st of November, 1871, the defendant by deed leased land for five years to the plaintiff, who agreed in lieu of rent to clear certain specified portions. Appended to the lease was an agreement, dated 25th January, 1876, which was to form part of the lease, "that in the event that the lessee shall get a *release* of the premises now leased, after the expiration of the said lease, then the value of a certain barn built by the lessee on the said premises shall be allowed to apply to the rent which shall be payable during the said release. The value of the said barn is \$400. In the event that there be no release as aforesaid, that the lessor shall pay to the lessee the sum of \$400 for the said barn, at the expiration of the said lease."

It was alleged that this agreement by mistake omitted to provide for a reference to arbitration as to the term of the renewal lease, (it being clear that by the term "*release*," the parties intended a renewal lease;) but the evidence as to such mistake was chiefly the verbal testimony of defendant, which the plaintiff denied. *Held*, that the agreement clearly could not be reformed by adding such provision.

*Held*, also, that the term "*release*" must be construed to mean a renewal of the old lease, and therefore a lease for the same term. And, *Semble*, that the rent would be payable, as before, by improvements, i. e., by the barn.

The defendant having refused to grant a new lease for more than three years, the plaintiff was therefore held entitled to recover the \$400.

On the 21st of June, 1876, the plaintiff assigned to one S. all his claim under the lease, with power to use his name for the collection of the same; but it was proved that this assignment was intended as security only for money lent by S. to the plaintiff. *Held*, following *Hostrawser v. Robinson*, 23 C. P. 350, that the plaintiff, notwithstanding the 35 Vic. ch. 12, O., might sue in his own name.

THE first count of the declaration alleged that the defendant, by deed dated 1st November, 1871, demised to the plaintiff certain land for five years from the date of the



deed, and in and by the lease agreed that in the event of the plaintiff not obtaining a new lease of the land at the expiration of the said term, the defendant would pay to the plaintiff \$400, being the value of a barn erected upon the said land by the plaintiff. Breach, non-payment of the \$400.

The second count was on a similar agreement, but alleged to have been made after the date of the lease, and during the tenancy by the lease created.

There were also the common *indebitatus* counts for work done, &c.

The defendant originally pleaded as follows :

To the first count: 1. *Non est factum*. 2. The granting of a new lease to the plaintiff after the expiration of the first lease.

To the second count: 1. *Non est factum*. 2. The granting of a new lease to the plaintiff after the expiration of the first lease.

To the first and second counts: that prior to the action, and within the time mentioned in the deed and agreement for the payment of the \$400, the plaintiff, by an assignment in writing made by him to one Henry Hatton Strathy, who accepted the same, transferred the \$400 to H. H. Strathy, of which defendant had due notice before action.

To the common counts: Never indebted, and payment.

The plaintiff took issue on the pleas, and replied to the fifth plea, that under and by virtue of the terms of the assignment Strathy was authorized to sue and take all steps in the name of the plaintiff for the purpose of collecting, demanding, and receiving from the defendant the amount payable by or recoverable from him, for or on account of the said claim or chose in action.

The defendant joined issue on the special replication.

The defendant afterwards obtained leave to plead and did plead several additional pleas, but none of them were placed on the record.

These were to the first and second counts: 1. That the written agreement did not properly express the real agree-

ment between the parties, in this, that by the real agreement between the parties the term of the second lease was to be left to the decision of two persons indifferently chosen, and averring readiness and willingness to perform that agreement.

2. That on the option given defendant by the agreement defendant only elected to extend the lease, and notified the plaintiff thereof.

3. That a reasonable time for the extension of the new lease was three years, and defendant, before action, offered the plaintiff to grant a new lease for three years.

4. That the agreement in writing did not express the true agreement between the parties; and asking for a reformation of the agreement.

The plaintiff it is supposed took issue on the added pleas, but no issue appeared either on the record or among the papers filed.

The plaintiff, for a further replication to the fifth original plea, pleaded at some time, not stated when and not on the record but among the papers filed with the record, alleged that the assignment in the plea mentioned was expressed to be made in consideration of the payment of the sum of \$185.25 then paid by Strathy to the plaintiff, and that the assignment, though absolute in form, was not intended to pass the whole interest of the plaintiff in the chose in action, but was made and executed to secure repayment of the said sum of \$185.25, with interest, and except as aforesaid the plaintiff has full power over the chose in action assigned; and that the action was brought for the plaintiff's own benefit, and in trust for Strathy to the extent aforesaid.

It was said at the argument, and not denied, that there was no traverse of this replication and none appeared among the papers.

The cause was tried at the last assizes for the county of Simcoe, before Wilson, J., without a jury.

The lease from the defendant to the plaintiff was proved. It was by deed, dated 1st November, 1871. The term was

five years from the first of November, 1871. The land demised was the east half of lot 30 in the 5th concession of the township of Essa, excepting some small parcels particularly described. There was no pecuniary rental. The *reddendum* was as follows: "The lessee to clear and fence the said demised lot as follows, in lieu of rent, viz., to put up a lawful fence on the eastern end of the said lot as far south as the mill site on Bear Creek, and another fence across the lot about the centre to the hill side, and a third fence on the western boundary of the said lot to the hill side, and to clear up and burn off the wood land or slashing on the northeast corner of said lot, containing about four acres; also, to clear up the wood land on the northeast corner of the said lot as far south as the hill side, from the railway company's land. And the lessee covenants to leave one field seeded down at the expiration of the lease."

Appended to the lease there was the following:—

"Whereas, the undersigned, the lessor and the lessee, in the within indenture of lease, dated the 1st day of November, A.D., 1871, resolve and agree that the following agreement shall form part of the said indenture, and shall be read in connection therewith, viz.: That in the event that the lessee shall get a *release* of the premises now leased, after the expiration of the said lease, then the value of a certain barn built by the lessee on the said premises shall be allowed to apply to the rent which shall be payable during *the said release*. The value of the said barn is four hundred dollars. In the event that there be *no release as aforesaid*, that the lessor shall pay to the lessee the sum of four hundred dollars for the said barn, at the expiration of the said lease, dated the 1st day of November, A.D., 1871.

"Given under our hands this 25th day of January, A.D., 1876.

"Witness  
ANGUS BELL."

JAMES GRAHAM,  
THOMAS DAWSON."

This writing was prepared by a person who was not a lawyer, and apparently had no knowledge of law.

The difficulty was that the written agreement omitted

in express language to provide either for the length of the new term, or for the annual rental, or for any mode of determining the same in the event of disagreement between the parties.

It was maintained by the defendant that it was a part of the agreement that in the event of disagreement two men indifferently chosen should determine these matters, but this was positively denied by the plaintiff, who maintained that the reference to men was to settle the value of the barn, and that the agreement afterwards written having fixed the value of the barn there was nothing left for the reference to men.

The defendant offered a new lease of the lot to the plaintiff for a term of only three years, but the plaintiff insisted upon having a lease for at least four years as value for the barn, and so the parties were unable to agree.

Nothing was said by defendant, during the discussion about settling the duration of the term by arbitration.

The plaintiff afterwards, by endorsement on the lease, executed the following assignment in favour of Mr. Strathy, the plaintiff's attorney :

“BARRIE, 21st June, 1876.

“In consideration of the sum of \$185.<sup>25</sup>/<sub>100</sub> to me in hand well and truly paid by H. H. Strathy, I hereby assign, transfer and set over to him, his executors, administrators, and assigns, all and every claim and demand I may have against the within named James Graham, under the terms of the within lease, or otherwise whatever, with full power and authority to use my name for the collection of the same, but for his own use and benefit.

“Witness my hand and seal, the day and year first above mentioned.

THOMAS DAWSON. [L. S.]

“Witness :

“FRED. W. WEBBER.”

The learned Judge was of opinion that the written agreement gave the defendant the option of renewing or not renewing, and, as a fact, found that he had not



renewed the lease or offered to renew other than for a term of three years. If this offer was to be held a compliance with the written agreement (no specific time of renewal being therein expressly mentioned), the learned Judge at first found as a fact that the offer for three years was a reasonable offer, so far as that finding might be available to the defendant. The learned Judge had some doubts as to whether the effect of the writing might not be to require a lease for a like term of five years, but did not decide the point. He was, however, at first inclined to think that by the original verbal agreement the duration of the term, as well as the valuation of the barn, were to be left to the decision of two men, and that in this respect the writing did not truly represent the agreement. So he allowed the plea to be added raising this defence, and asking for the reformation of the writing.

He thereupon found the issues,—the second, third, (excepting as to the promise), fourth, fifth, and seventh, and the issue on the replication to the fifth plea, for the plaintiff, and the remaining issues, excluding those on the added pleas, for the defendant, and ordered that the agreement be reformed according to the matters and facts in the equitable plea set forth; but, if the Court should be of a contrary opinion, he assessed the damages for the plaintiff at \$412.

The learned Judge, after this finding, during the same assize, changed his mind, and announced to the parties:—

1. That three years was not a sufficient or reasonable term of extension, but that it should have been for four years.

2. That the special, or added plea, was not proved, and the contract should not be reformed.

1. Because the plaintiff denied that two men were to arbitrate as to the length of the term.

2. Because no mention of it is made in the written agreement, and for the reason that when Mr. B. drew it the parties had agreed on the price of the barn, and the two men were not required for the decision as to the term.

3. Because the defendant never mentioned during the discussion as to the length of the term anything about arbitration.

And so the learned Judge said he ought to have found a verdict for the plaintiff as to these matters, but, doubting his power to interfere with the record, he left the plaintiff to his motion against the verdict.

The learned Judge intimated, as there was no plea raising the sufficiency of the offer of a three years' lease as a defence, that defendant should have leave to add a plea to that effect.

During this term, May 22, 1877, *H. H. Strathy*, obtained a rule calling on the defendant to shew cause why the verdict entered for the defendant on the third issue as to the promise, on the sixth issue, and on the issues raised by the equitable plea added at the trial, should not be set aside, and a verdict entered for the plaintiff for \$412, pursuant to the Law Reform Act, on the ground that the verdict on the said issues is contrary to law and evidence and the finding on the facts of the learned Judge who tried the cause, the said learned Judge having found and the evidence shewing that the written agreement set out in the second count of the declaration herein was signed by the parties hereto, and was in fact their agreement; and that the equitable plea, which sought to add to and vary the terms of the said written agreement, was not proved in its material parts.

During the same term, May 31, 1877, *McCarthy*, Q. C., shewed cause. The plaintiff having made an assignment of the chose in action cannot now sue in his own name: *Wellington v. Chard*, 22 C. P. 518. [*Strathy*. There is no issue on the second replication to the fifth plea, but I consent to be made plaintiff, should the Court hold that the action must be brought in my name.] If the action is properly brought in the name of the plaintiff, the agreement should be reformed: *Harris v. Pepperell*, L. R. 5 Eq. 1; *Brown v. Blackwell*, 35 U. C. R. 239.

*H. H. Strathy* contra. Such a transfer as the present is not within 35 Vic. ch. 12, O.: *Hostrawser v. Robinson*, 23 C. P. 350. This is not a case for reformation of the contract on the ground of mistake: *Fry* on Specific Performance, secs. 514, 516. Then, as to the meaning of the contract, defendant was bound to renew or pay \$400 for the barn: *Hutchinson v. Boulton*, 3 Grant 391; and there being no specification as to the term of the new lease, it should be for the same term as the old one: *Price v. Assheton*, 1 Y. & C. 82. This was refused by defendant when he refused a lease for the less term of four years, and so the plaintiff was entitled to recover the \$400 and interest. A bill as to the specific performance of an agreement, if any, to refer to arbitration will not lie: *Omerod v. Hardman*, 5 Ves. 722; *Street v. Rigby*, 6 Ves. 815. The term is material for the purposes of the Statute of Frauds: *Clark v. Fuller*, 16 C. B. N. S. 24.

June 30, 1877. HARRISON, C. J.—The first question is, whether the plaintiff, notwithstanding the written assignment dated 21st June, 1876, can maintain this action in his own name.

If the assignment be one within the operation of 35 Vic. ch. 12, sec. 1, O., that statute directs that the assignee “shall sue thereon in his own name.”

In *Hostrawser et al. v. Robinson*, 23 C. P. 350, it was held that where the assignor, instead of parting with his whole interest in the award, was, in truth, pledging the amount of the award for the loan of a sum of money less than the amount of the award, and by the assignment authorized the assignee in the name of the assignor to take all necessary steps for the collection of the amount of the award, retaining thereout the amount advanced, that the action was properly brought in the name of the assignor.

The replication to the fifth plea in this cause appears to us to bring the case within the principle of *Hostrawser v. Robinson*, and there was no contention to the contrary at

the trial. Indeed, it is said that the defendant did not take issue on that replication. . The plaintiff swore to having executed the assignment to Mr. Strathy as "security" to him. It is not now suggested that the fact is otherwise. We ought not, we think, to assist the defendant, who made no contest on the point at the trial.

Then, assuming the facts in the replication alleged, and which are not denied, to be true, the question is if there were a demurrer to the replication, which there is not, would be whether it should appear on the face of the assignment, that the assignment was made only as a pledge for a loan in order to except the case from the operation of the statute. We do not see that this should make any difference. Where it appears that the assignor has divested himself of all beneficial interest, and the thing assigned is a debt or chose in action, the action must be brought in the name of the assignee, who is the real as well as beneficial owner. But where the assignor still retains a beneficial interest he, according to the *ratio decidendi* of *Hostrawser v. Robinson*, as we understand it, is not prevented from suing at law, as before the statute; in his own name. We follow *Hostrawser v. Robinson*, being the decision of a co-ordinate Court, without any expression of our own on the point there decided. But if that decision or our application of it were successfully impeached, as the only result in this case would be the substitution as plaintiff of Mr. Strathy, who is the plaintiff's attorney, and willing to be so substituted, we shall not further dwell on the point.

The second and more important question is whether the agreement on which the plaintiff sues should at the instance of the defendant be reformed, and so reformed, on the ground of mistake, as to defeat the plaintiff's action.

A person who seeks to rectify an instrument on the ground of mistake must prove not only that there has been a mistake, but must be able to shew exactly and precisely the form to which the deed ought to be brought in order that it may be set right according to what was really intended, and must be able to establish in the clearest and



most satisfactory manner that the alleged intention of the parties to which he desires to make it conformable, continued concurrently in the minds of all parties down to the time of its execution: *Kerr* on Frauds, 350.

A mistake on one side may be a ground for rescinding but not for correcting or rectifying an agreement. *Ib.*, 351.

The same writer, referring to *Harris v. Pepperell*, L. R. 5 Eq. 1, the case relied upon by Mr. McCarthy, where Lord Romilly said that the rule that the Court would not rectify an instrument on the ground of mistake, except the mistake is mutual, is liable to an exception in a case between vendor and purchaser, says, that the distinction is not supported by authorities and does not seem sound. No doubt parol evidence is admissible on an application to rectify an instrument on the ground of mutual mistake, but where there is not anything in writing beyond the parol evidence to go by, and the defendant by his answer denies the case set up by the plaintiff, the plaintiff will often be without a remedy, though even in such cases the parol evidence may be so conclusive as to justify the Court in granting the relief prayed: *Ib.* 352, 353.

The evidence as to the particular omission in this case (reference to arbitration as to duration of term) is not only simply oral but almost exclusively the oral testimony of the defendant himself, and is most distinctly denied by the testimony of the plaintiff. Under these circumstances the fact that while the duration of the term was under discussion between the parties there was no reference by the defendant to the terms of the original agreement as he now contends, is almost conclusive against his present contention. We unhesitatingly assent to the conclusion which the learned Judge reached after his formal decision of the case, that is to say, that the agreement in writing must be held to express the whole agreement between the parties.

The third and remaining question, and the most difficult of all, is, as to the construction of the written agreement and the rights of the parties thereunder.

This case furnishes one of the many illustrations afforded to Courts of Justice of the prodigious folly of employing men not trained to the science of the law to prepare writings, in the preparation of which legal precision and some knowledge of legal principles are absolutely required.

The difficulty is, for the Court to say clearly what parties mean by a written document which scarcely contains language enough to express any definite meaning, and which in almost any view is apparently imperfect of meaning.

The primary idea of the parties to this contract, so far as we can judge from the language used, was, that the tenant should in some mode be paid for the erection by him of a barn on the premises demised to him.

The modes provided are either a release, meaning a renewal of the then existing lease, or money, the latter to be payable only on refusal of the landlord to grant the former

The dispute between the parties has throughout been as to the meaning of the word "release." No lawyer would have used such a word to express the granting of a new lease. But the granting of a new lease or renewal of the first lease was unquestionably what the parties to the contract intended.

Such an agreement; so far as it calls for a new lease, is within the operation of the Statute of Frauds, and all the material terms of it must be in writing: *Jackson et ux. v. Yeomans*, 39 U. C. R. 280; and the duration of the lease proposed to be given is a material term: *Bayley v. Fitzmaurice*, 8 E. & B. 664, 9 H. L. 78; *Clark v. Fuller*, 16 C. B. N. S. 24.

No Court will decree specific performance of an agreement for a lease, where there is no definite term expressed for which the lease is to be granted: *Gordon v. Trevelyan*, 1 Price 64; *Clinan v. Cook*, 1 Sch. & Lef. 22; *Harnett v. Yielding*, 2 Sch. & Lef. 549.

The argument on the part of the plaintiff is, that this contract is definite as to the term. Let us now consider

this argument. The agreement is endorsed on a written lease, and is "to form part" thereof, and "to be read in connection therewith." That written lease provides for a term of five years. The agreement is for a release—that is another or *renewal* lease of the former term, which is for five years. There is authority to shew that this may be the proper construction of the language used: *Price v. Assheton*, 1 Y. & C. 82.

In that case the Lord Chief Baron said, p. 91: "Now in looking to the pleadings, there appears to me to be evidence to shew that the lease agreed to be given was intended to be a *renewal lease*; that is, a renewal of the old lease; and therefore, in point of duration, coinciding with the former lease."

We cannot say that this was not the meaning of the parties to the agreement before us, judging their meaning as we are bound to do solely by the language used. We must hold this to have been their meaning unless there be something in the writing opposed to such an interpretation. The writing provides "that in the event that the lessee shall get a release of the premises now leased after the expiration of the said lease, then the value of a certain barn built by the lessee on the said premises shall be allowed to apply to the rent which shall be payable during the said release." The words are not, shall be deducted from the amount of rent payable, but "*shall be allowed to apply*" to the rent which shall be payable, which expression may mean shall be treated as equivalent for the rent payable, or shall be deducted from the larger amount, if any, payable under the said lease.

Now as the agreement makes no provision for the payment of a larger amount of rental, we cannot assume that there is any provision made for a deduction. In the absence of such a provision it is not, we think, at all straining the meaning of the writing to decide that the rent under the new lease, like the rent under the old lease, shall be payable by improvements, the improvements in the case of the new lease being represented by the barn.

But whether this is the proper construction or not as to the *mode* of payment of rent we must decide that what the parties meant by the word "release" as used in the contract was a second lease for the term of five years. This being the conclusion at which we have arrived, the only question we have next to ask ourselves is, whether at the expiration of the old lease the defendant offered to give or did give such a lease to the plaintiff? The evidence is clear that he did not—that he refused, although the plaintiff was at the time willing to accept a lease for only four years, to give the plaintiff a lease for that lesser term. What follows? "In the event that there be *no release as aforesaid* then the lessor shall pay to the lessee the sum of four hundred dollars for the said barn at the expiration of the said lease, dated the first day of November, A.D. 1871."

We are of opinion, under the operation of the words just quoted, that the right to sue for the \$400, the money payment for the building of the barn, had arisen to the plaintiff long before suit, and that the amount is on the facts recoverable either under the special count or the common counts.

MORRISON, J., and WILSON, J., concurred.

*Rule absolute.*

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## REGINA V. ROBERT W. PARKINSON.

*False pretences.*

Defendant was indicted for obtaining by false pretences from M. an order for the payment of \$806.69, the property of P., with intent to defraud. It appeared that a suit was pending in Chancery, in which the defendant, who was a solicitor, but had been struck off the rolls, was acting for P. Defendant procured V., his clerk, to write a præcipe in the name of McG., who had acted as counsel on defendant's instructions, for \$806.69 of the moneys standing to the credit of the cause, and to sign McG.'s name to it. V. left it with M., the accountant in Chancery, who prepared a check payable to P. or order. Defendant then got one H., a solicitor, to get the check from the accountant and sign McG.'s name to the receipt, on which H. handed the check to defendant, who got P. to endorse it, and paid P. \$400, keeping the rest for costs.

*Held*, that the defendant was rightly convicted, for he obtained the check from the accountant by fraud and forgery, and with intent to defraud him; and he was not the less guilty because P. was entitled to the money, and there was no sufficient proof of intent to defraud P.

CASE reserved by the Junior Judge of the County Court of the county of York, at the General Sessions of the Peace held on the 22nd September, 1876.

Indictment. First count, for that the defendant unlawfully and fraudulently by false pretences did obtain from Benjamin William Murray an order for the payment of certain sums of money to the amount of \$806.69, the property of John Puterbaugh, with intent to defraud.

Second count: for that the defendant, with intent to defraud the said John Puterbaugh, did by false pretences unlawfully, knowingly, and fraudulently induce the said John Puterbaugh to endorse the aforesaid order for the payment of the moneys aforesaid in order that the same might be afterwards used and dealt with as a valuable security.

Third count: for that the defendant unlawfully, fraudulently, and knowingly, by false pretences did obtain from the said John Puterbaugh a certain sum of money, to wit, to the amount of \$406.69, of the moneys of the said John Puterbaugh, with intent to defraud.

The evidence was as follows:

*Benjamin W. Murray* said: I am a clerk in the office of

accountant of the Court of Chancery. My duty is to receive receipts for cheques and to pay out the cheques to parties. A præcipe was received by me purporting to be signed by D. McGibbon, solicitor for John Puterbaugh. John Varcoe left the præcipe. I issued the cheque to John Puterbaugh for \$803.50. I gave the cheque to Mr. Hall, barrister. He came and asked for it, and I gave it to him. In nine cases out of ten others than the solicitors come for the cheques. Mr. Hall is a solicitor of the Court of Chancery and is responsible. I would not have given it to Parkinson. He is not an officer of the Court. He is struck off the rolls. John Puterbaugh endorsed the cheque. Parkinson's name is under it.

*William M. Hall* said : I am a solicitor of the Court of Chancery. I went to the accountant's office at the request of Parkinson to get some cheques from the office. I asked Parkinson whose name I should sign, and understood that he was acting for Mr. McGibbon. I asked for the cheques, and signed McGibbon's name per Wm. M. Hall. Parkinson told me that McGibbon was acting for the parties. I brought the cheques down the same day. I was asked to bring them down. I see signature John Puterbaugh, which is the same as the receipt.

*Duncan McGibbon* said : I am a barrister. In the suit of *Quantz v. Smelzer* I was acting for a number of defendants, not for John Puterbaugh. The præcipe is signed by Varcoe, a clerk in Parkinson's office. I never authorized anybody to get a cheque for John Puterbaugh, to leave præcipe or to go to the Hall for it.

*Cross-examination* : Parkinson saw the clients. I had never seen them, and the communications I had were through Parkinson. There were a great many parties to the suit. I never saw the retainers. The costs are sometimes paid out of the estate. Mr. Arnoldi, a clerk in the office of the registrar of the Court of Chancery, said Mr. Parkinson was struck off the roll of solicitors of the Court on the 2nd of June, 1875.

*John Varcoe* said : In May last I was a clerk in Parkin-

son's office. I wrote this præcipe at the request of Parkinson. I took it to the Court of Chancery.

*Cross-examination:* I was a clerk in the old firm of Vankoughnet & Parkinson. The suit was commenced in 1872, to set aside a will. I have seen John Puterbaugh in the office to receive money. Parkinson and he had quite a talk. The costs would amount to about \$5000. I saw John Puterbaugh sign the receipt. I read it to him very deliberately and he understood it. Parkinson's bill must have been several hundreds of dollars. Each party was charged according to the amount received. Parkinson's costs amounted to about \$3000. I understand that there are costs which cannot be taxed against a client, and which he would be responsible for.

*John Puterbaugh* said: I am a farmer. I was 80 years old last June. I live in Vaughan, on the 6th concession. I was entitled to get money from the estate of John Puterbaugh. Letter came to me in the States. Got a letter from Parkinson that money was ready. I went to Parkinson in May last. I got \$400. He told me \$800 was coming to me, but \$400 costs. I endorsed the cheque, and the receipt is mine. I do not know that I objected to his keeping the \$400.

The order was as follows:

In Chancery:

TORONTO, 16th May, 1876.

\$803 50 principal.  
3 19 interest.

Quantz v. Smelzer:

Court of Chancery.

Pay to John Puterbaugh or order, out of moneys standing to the credit of this cause, the sum of eight hundred and three dollars,  $\frac{5}{100}$  and out of the moneys standing to the credit of the general interest account with the Court, the sum of three dollars,  $\frac{1}{100}$  pursuant to order of Court bearing date the 15th and 16th days of November, 1875.

B. W. MURRAY,  
Accountant Clerk C. C.

Countersigned:

R. P. STEPHENS,  
Ref.

W. AULT,  
R. C.

To the Manager of the Canadian Bank of Commerce.

The receipt was as follows :

TORONTO, May 30, '76.

Received from R. W. Parkinson the sum of four hundred dollars on account of my share in suit of Quantz *v.* Smelzer, being the amount at present payable after deducting the general costs of suit, but in the event of other parties contributing towards such costs then my share is to be increased proportionately, at present there being less than eight full shares contributing towards such costs.

(Signed) JOHN PUTERBAUGH.

Witness :

(Signed), JOHN G. VARCOE.

Of Toronto, Law Clerk.

The order was endorsed by John Puterbaugh, and Parkinson got the amount of it, \$806.69, from the bank.

The learned Junior Judge of the County Court left the case to the jury, who found a verdict of guilty against the defendant on all the counts; but under the statute he reserved the case for the opinion of this Court, whether the evidence presented a sufficient case to be left to the jury.

The case was argued in Michaelmas term, December 6, 1876.

*M. C. Cameron*, Q. C., for the defendant. There was no false pretence, because John Puterbaugh, the prosecutor, consented to the defendant getting the money he received, and keeping the portion of it he retained: *Regina v. Gemmel*, 26 U. C. R. 312; *Regina v. Giles*, 10 Cox 44. The defendant, although struck off the rolls of the Court, was and is entitled to recover the costs he had before earned and was entitled to.

*Fenton*, County Attorney, contra. It does not appear the defendant had the right to take any of the money from Puterbaugh. The defendant, at a time when he was not on the roll of solicitors of the Court, got his clerk, Varcoe, to write a præcipe in the name of McGibbon in order to get the money from the Court. In that way he did by false pretences get the money order from the Court of Chancery. He pretended he was acting for McGibbon,



and he was not, because he had no power to use McGibbon's name. Now it is said the defendant had no intent to defraud; but he had no right to draw the money as he did, and to apply it as he did.

June 30, 1877. WILSON, J.—The facts are, that there was a suit in Chancery of *Quantz v. Smelzer*, and many other defendants, which was begun in 1872, and was pending in May, 1876, and is probably still pending.

It does not appear for whom Parkinson was acting at any time. He was the person who saw the parties he was representing or pretended to represent in that suit, and he instructed Mr. McGibbon from time to time, who acted as counsel in the cause for the persons the defendant represented or assumed to represent.

There is no evidence that the defendant was the solicitor at any time of John Puterbaugh. Mr. McGibbon said that he did not act for Puterbaugh.

But from the fact of the defendant getting Puterbaugh to endorse the cheque issued by the Court in order that the defendant might draw the money upon it, and from the fact of the defendant paying the \$400 to Puterbaugh—part of the proceeds of the cheque—and getting his receipt therefor, it appears he did in fact act for him upon these occasions, and to the extent just mentioned.

Whether he had any antecedent authority from Puterbaugh to act in the case for him, or to draw the money in his name, does not appear.

Assuming, however, that he had the right to act as agent for Puterbaugh, or that he honestly believed he had, what he did was this: He procured Varcoe, his clerk, to write a præcipe for the money in the name of Mr. McGibbon, and to sign Mr. McGibbon's name to it; and that he had no authority to do. It was in fact a forgery, upon the evidence before us. The præcipe I have not seen, nor a copy of it, but Mr. Murray said: "A præcipe was received by me purporting to be signed by D. McGibbon, solicitor for John Puterbaugh."

Now, Mr. McGibbon said he had no authority to act for Mr. Puterbaugh.

If the defendant had, Mr. McGibbon had not, and the use of McGibbon's name as solicitor for Puterbaugh was therefore an abuse of Mr. McGibbon's name for such a purpose. It was in fact a forgery.

The *præcipe* being thus prepared, Varcoe, the defendant's clerk, who wrote it for the defendant, took it to the Chancery accountant's office and left it there.

Mr. Murray then prepared the cheque payable to John Puterbaugh or order.

The defendant then got Mr. Hall, a barrister, to go to the accountant's office for the cheque, and he told Mr. Hall to sign the receipt for the cheque in Mr. McGibbon's name, and Mr. Hall says he understood McGibbon was acting for several of the parties in the suit. Mr. Hall did go for the cheque, and he got it, and he signed Mr. McGibbon's name to the receipt, and he gave the cheque to the defendant.

These acts so done by the defendant, although he paid the whole of the money he got over to Puterbaugh, would not alter the case. He got the money by fraud and forgery, and that could only be done with the intent to defraud somebody. It was not Puterbaugh if the latter were a consenting party to the getting of the money, although he did not know of the guilty means by which the money was to be or was got. Nor would Puterbaugh be defrauded if he got the whole of the money. But if Puterbaugh did not assent to the money being got by the defendant and did not receive the money, it might be a fraud upon him. Or if he did not assent to the money being got by the defendant, but he was informed of it afterwards and of the means by which it was got, and took a part of it, he might make himself an accessory after the fact; but I doubt if he could ratify what the defendant had done, because the act was a crime, and his ratification could not cure or make good the unauthorized use by the defendant of McGibbon's name, although it might confirm the unauthorized application made on behalf of Puterbaugh for the money.

If Puterbaugh did not assent to the money being applied for on his account, but he afterwards took a part of it, not knowing the means by which it had been got, there might still be a fraud committed upon him as to the residue of the money which the defendant retained for himself, if he applied for the money in order to enable him wrongfully to appropriate a part of it to his own use without the assent of Puterbaugh; and the fact that Puterbaugh is an old man, eighty years of age, might perhaps be some evidence of that fact, if Puterbaugh did not owe the defendant the costs for which the money was retained, or the defendant had no reasonable ground for believing that he did.

But these are matters of which we know nothing. We do not know whether Puterbaugh ever was a client of the defendant, nor that the defendant as agent or otherwise ever had authority to act or acted for him; nor whether there were any or what costs owing by Puterbaugh to the defendant.

I cannot therefore say there is evidence on which the defendant could be convicted of any intent to defraud Puterbaugh.

There is no evidence to shew upon what statement Puterbaugh endorsed or was induced to endorse the cheque, which is the second count; nor is there evidence to shew the defendant retained the \$406.69 by false pretences, which is the third count.

And there is just enough evidence given on these two counts which shew that the defendant did nothing with intent to defraud Puterbaugh. Puterbaugh was a party to the suit.

The defendant was acting, rightly or wrongly, for several of the parties in the suit, but whether for Puterbaugh or not there is no satisfactory evidence. The defendant did not write to Puterbaugh about the suit. Puterbaugh came here; he endorsed the cheque, and he got part of the money. The defendant has or claims a large amount of cost to be due to him, and among others by

Puterbaugh, and Puterbaugh by his receipt has assented to that. I cannot infer from these facts that the intent was to defraud Puterbaugh.

But the first count is proved. In my opinion the cheque was unlawfully got from Mr. Murray, the property of Puterbaugh, by fraud and forgery. That offence was complete whenever the defendant got the cheque. He got it with intent to defraud Mr. Murray, and he did defraud him, for he induced him by forgery to deliver over to defendant money the defendant was not entitled to receive from the Court of Chancery, although Puterbaugh was entitled to receive it. I cannot think that the defendant by false pretences can get the money of Puterbaugh for him from the Court of Chancery, and yet be free from the offence because Puterbaugh was entitled to the money.

It is said if the servant of a creditor procure goods from the wife of the debtor for a claim for which payment could not be got, by the false pretence that the creditor had bought them from the debtor, that the servant is not guilty of obtaining the goods by false pretences if his intent was to get the goods for his master, the creditor, by putting it in his power to pay himself the debt which the other owed him : *Rex v. Williams*, 7 C. & P. 354. That seems to me to be rather doubtful law.

It may be said that the whole amount of a cheque was drawn by false pretences, although only a small part of it was so obtained, and the rest of the money was properly applied : *Regina v. Leonard*, 1 Den. C. C. 304.

Here the intent to defraud Puterbaugh would be proved with respect to the \$406.69, not paid over to him, if it were shewn clearly that the defendant had no pretence to that portion of the money or any of it; but that is not shewn; there is evidence that he might have some such claim as he has made, and it was assented to by Puterbaugh, if he were not imposed upon and cheated by the defendant, considering his great age, but we have no evidence to warrant such an inference.

I do not see that any question as to ratification arises



here properly, but on that point *Brook v. Hook*, L. R. 6, Ex. 89, may be referred to.

In my opinion the first count is rightly framed—32-33 Vic. ch. 29 sec. 21, D.,—and the evidence supports it.

HARRISON, C. J., and MORRISON, J., concurred.

*Judgment for the Crown.*

### DEAR V. WESTERN ASSURANCE CO.

*Fire insurance—Part of the loss payable to others—Right of plaintiff to sue—Incumbrancer—Misrepresentation and concealment—New trial—38 Vic. ch. 65, O.—Power of Provincial Legislature.*

Action on a fire policy effected with the plaintiff for \$2,500, by which the loss, if any, was made payable to W. to the extent of \$1,000, and to B. to the extent of \$400, "as their interest may appear." *Held*, that the plaintiff might sue in her own name, being entitled to the surplus above these sums, which was found by the jury to be \$130, the words "as their interest may appear," applying to a reduction of these sums, not to a payment beyond them.

The verdict being for \$1,530, releases were offered on behalf of B. and W., and the Court therefore thought it unnecessary to consider whether they should be made parties to the suit.

The application contained a question, "If encumbered, state to what amount," to which no answer was made, but on the face of the application was written, "Loss, if any, payable to Joseph Watson, \$1,000; H. G. Bernard, \$400, or as their interest may appear." The agent who took the application said he knew from this that the property was encumbered. There was also a mortgage given by a former owner on this and other property to one Whitney, of which, however, the plaintiff knew nothing. *Held*, that there was no misrepresentation or concealment in either case.

By the policy the plaintiff was bound to use all possible diligence in case of fire in saving and preserving the property insured, and the jury having found in her favour on this issue, upon the contradictory evidence set out below, the Court refused to interfere.

They found also for the plaintiff on the plea of arson, for which she had been prosecuted and acquitted; and the Court, notwithstanding very strong circumstances of suspicion, which are stated in the case, refused a new trial.

*Held*, also, that the 38 Vic. ch. 65, O., was not beyond the power of the Provincial Legislature, and applied to the defendants.

ACTION for loss on fire policy.

Pleas. 1. Policy not the deed of defendants.

4. That the plaintiff in her application for insurance stated that the insured premises were unincumbered, whereas there were then three several mortgages over the said property, and that by such misrepresentation and concealment the defendants were induced to accept the said risk, whereby the policy became void and of no effect.

5. That the plaintiff in her application stated that the insured premises were unincumbered, with the exception of \$1000 payable to one Joseph Watson, and \$400 payable to H. G. Bernard, or as their interest may appear, whereas at the said time the said premises were also incumbered to the extent of \$700 by a mortgage made by one J. J. Smith to one J. W. G. Whitney, and that by such material misrepresentation and concealment the defendants were induced to accept the said risk, whereby the policy became void and of no effect.

6. That one of the buildings insured became unoccupied for thirty days, and no notice thereof was given in writing to the secretary of the defendants' company, contrary to a condition of the policy, which was a condition precedent.

7. That the plaintiff failed to use all possible diligence in saving and preserving the property insured, within the meaning of the condition to that effect set out, and the loss and damage sued for have been sustained by the plaintiff in consequence of such neglect, whereby the defendants are not answerable to make good to the plaintiff such loss or damage or any of it.

8. That the plaintiff did not deliver to the defendants at any time before suit the affidavit of any builder or machinist, or other competent person acquainted with the premises before their destruction, as to the cash value of the same at the time of the fire, to the best of their knowledge and belief, whereby the said loss has not yet become payable.

Issue was joined on these pleas.

The plaintiff also replied to the 8th plea. 1. That the omission to deliver in such affidavit was by accident and

mistake of the plaintiff, who was not aware and overlooked the fact that it was required. 2. That the plaintiff delivered in a statement and proof of her loss in good faith in pursuance of the policy; and the defendants, through their agent, objected to the loss upon the ground only that the premises were burnt and destroyed wilfully and maliciously by the plaintiff; and the defendants did not object to the loss upon other grounds. And that the defendants did not within a reasonable time after receiving the said statement or proof, or at any time, notify the plaintiff in writing that such statement or proof was objected to, and what the particulars were in which the same were alleged to be defective.

Issue.

The cause was tried at Toronto, at the last Spring Assizes, before Moss, J., with a jury, when a verdict was rendered for the plaintiff, and the damages were assessed at \$1530.

According to the application the loss, if any, was "payable to Joseph Watson, \$1,000; H. G. Bernard, \$400, as their interest may appear." By the policy it was, "loss, if any, payable to Joseph Watson to the extent of \$1,000, and to H. G. Bernard to the extent of \$400."

There appeared from the evidence to have been three mortgages on the insured premises existing at the time of the fire, one to W. G. Whitney from J. J. Smith (a former owner), dated October 28, 1874, for \$700; a second made by Smith to Watson, for about \$1,000. These mortgages were before the purchase of the premises from Smith by Mrs. Dear. The third mortgage was by Mrs. Dear to H. G. Bernard about two years before the fire. The other facts of the case and the objections taken sufficiently appear in the argument and judgment.

During this term, May 23, 1877, *W. H. L. Gordon* obtained a rule calling on the plaintiff to shew cause why the verdict for her should not be set aside, and a nonsuit or verdict be entered for the defendants, on leave reserved, on the ground that there was a material misrepresentation and concealment on the part of the plaintiff, in her application,

of the mortgages held by Bernard and Watson, as alleged in the fourth plea; and also in respect of the mortgage held by Whitney, as alleged in the fifth plea: that it was shewn the plaintiff was suing for her own benefit, and not as trustee for Bernard and Watson to whom the loss was made payable in the policy, or for either of them, and that the interest of these persons is in excess of the whole amount payable on the policy, whereby the plaintiff cannot recover anything in this suit: that a payment by the defendants to the plaintiff would be no bar to an action on the policy by the said Watson and Bernard. And that the first and seventh plea were proved to be true in fact. And because also the verdict was against law and evidence and the weight of evidence. Or why the damages should not be reduced to such an amount as the Court should think the plaintiff entitled to recover on her own behalf. And also why the judgment should not be arrested, inasmuch as the plaintiff's special replications to the eighth plea are not a sufficient answer in law thereto, and are a departure from the declaration.

During the same term, June 2, 1877, *M. C. Cameron, Q. C., Thorne* with him, shewed cause. The misrepresentation as to the mortgages complained of is as follows. The Whitney mortgage was taken from a Mr. Smith, who owned the property which the plaintiff now owns, and also some other property adjoining it. Smith gave the mortgage over the whole property about there which he owned. Then he sold to the plaintiff the property she owns. She knew nothing of the mortgage which Smith had given until after the loss of the buildings. Smith, after selling to the plaintiff, sold the rest of the property to Mr. McCord, who was to pay off the whole of that mortgage, and who has paid all the interest upon it. There can be no misrepresentation and concealment of a matter when the person charged with such conduct has no knowledge of the matter. Then it was said that there was misrepresentation, and concealment by the plaintiff that the property was encumbered with the two mortgages held by Watson for \$1000 and by Bernard



for \$400; and that charge is made against the plaintiff, because in the application there is a question "If encumbered state to what amount?" and the place for an answer is left blank—that is, there is no answer to the question. That is no misrepresentation, and in this case the defendants cannot say there was any concealment, because on the face of the application is written "Loss, if any, payable to Joseph Watson \$1000, H. G. Bernard \$400, as their interest may appear." The agent for the defendants who received the application said he learned from the note on the application of the two mortgages and he knew it was encumbered, and the question being unanswered he took it for granted there was no further encumbrance. The defendants therefore knew of these two mortgages at the time of the application, and there was no concealment.

It is contended by the defendants that the plaintiff cannot sue for the loss, because the policy declares on its face that the loss, if any, is to be paid to Watson and Bernard, as before stated. But that is no reason why the plaintiff should not sue for it. The issue on the plea of arson should not in the event of a new trial be sent to a jury again. The plaintiff was tried on an indictment for the arson and was acquitted, and she has in this cause been tried a second time for it and acquitted, and she should not be subjected to a third trial for it. He referred to *McDonell v. The Beacon Fire and Life Assurance Co.*, 7 C. P. 308.

*Thorne* undertook to procure a release from Watson and Bernard to the defendants, if and when they paid the amount of the verdict. He referred to *McDermott v. Ireson*, 38 U. C. R. 1.

*Ferguson*, Q. C., *W. H. L. Gordon* with him, supported the rule. Bernard and Watson have together a claim exceeding the amount of the damages assessed, and they could have sued and can sue for the amounts respectively payable to them by the defendants. The plaintiff cannot therefore maintain the action. She did not pretend she was suing for herself, but for them: *The Bank of Hamilton v. The Western Assurance Co.*, 38 U. C. R. 609. These parties are entitled to

recover either more or less than \$1400 between them by the language of the application, which is, "or as their interest may appear," and they are not restricted to the \$1400 by the words in the policy, "to the extent of," \$400 and \$1000. The defendants did not know these two claims were mortgages upon the property, for the application did not state them to be by mortgage, and the question about incumbrances is left unanswered, which is in effect an assertion that the premises were not encumbered. There was therefore misrepresentation; but if the not answering is not a misrepresentation, it is at any rate a concealment, and either of these will avoid the policy; and besides these two mortgages there was Whitney's mortgage, of which the company in no way, by implication or otherwise, had any notice, and it is of no consequence that Mr. McCord had engaged to pay it off. The form of the question must be considered. It is not, "Is your property encumbered?" but, "If encumbered, state to what amount?" That is, if it is not encumbered the question requires no answer, but if encumbered, then it must be answered. What else could the company infer from no answer being given than that the property was not encumbered? Upon the seventh plea the finding should have been for the defendants, because the plaintiff did not use due diligence to save and protect her property. She admitted herself that after the first fire that day she heard the men say, as they left the place, that the fire was not out, and yet she left the house immediately after that, no one being in it, and locked it, and took the key with her, and not long after that the second fire took place, when she was at a neighbour's house. When the second fire did take place, the plaintiff loitered on her way back to her house. And then the third fire followed that night, and she was not at it till it was nearly over. If the fact be, as she said, that the fires were all connected together, and that the fire was never out from the first until the final fire, there must be strong evidence of all want of proper diligence upon the plaintiff's part to save, or try to save, the property. The

rule also is to arrest the judgment, because the defendants were incorporated under the 14-15 Vic. ch. 162, and the 35 Vic. ch. 99, D., has extended 31 Vic. ch. 48, amended by the 34 Vic. ch. 9, to these defendants, and the 38 Vic. ch. 81 D., also applies to them; so that the 38 Vic. ch. 65, O., cannot be made to apply to them, and it is under that Act that the special replications to the eighth plea have been pleaded: B. N. A. Act, sec. 92 sub-sec. 13; *Cooley on Constitutional Limitations*, 3rd ed., p. 279. The case of *Billington v. The Provincial Ins. Co.*, 24 Grant 299, is against this contention. They referred to *Martin v. Home Ins. Co.*, 20 C. P. 447; *Morrison v. Universal Marine Ins. Co.*, L. R. 8 Ex. 40, in Ex. Ch. 197.

June 30, 1877. WILSON, J.—There is very much in this case that is very unsatisfactory and remarkably suspicious.

A building used for a tavern, with the adjoining erections, in 1875 was insured with the defendants to the extent of \$1500, and the contents of the building and of the other erections were insured at the same time with another company to the extent of \$1000.

The license for the house for 1876 was refused, and the property became unprofitable, and one day last October, while no one was about but the plaintiff, and a neighbour girl who had just been sent for, the house upstairs was discovered to be on fire, which, with the assistance of some men, was put out, or supposed to be put out.

Then the plaintiff locked up the house and left it, and in less than two hours after, while she was at her neighbour's, some persons travelling on the road discovered it on fire, which fire was in a different room from the one in which the first fire was. In a while the plaintiff came, and they asked her for the key. She said she had forgot it, and left it at a neighbour's. They asked if there was not a ladder about; she said there was not. She then went for the key, and while she was away the men looked about for a ladder and found one, and by it they got into the house by the upper window before the plaintiff came back with the key,

and that fire was extinguished—or was supposed to be. The plaintiff then left the place, and about nine o'clock it took fire again in a shed, and it was nearly burned to the ground before the plaintiff came to it from her neighbour's. The place was effectually destroyed by the third fire. And there were hardly any goods in or about the place.

It is not wonderful the defendants refused to pay the policy, and that she was prosecuted for the arson.

The case must be dealt with on its legal bearings and upon the merits, as if it were free from those grounds of suspicion.

The first question is, whether the plaintiff can maintain this action in her own name when, by the application and policy she has had the loss to the extent of \$1400, or as the interest of Bernard and Watson may appear, made payable to them ?

The limit of money payable to them is the \$1400. The words are, the loss if any, "payable to Watson *to extent of* \$1000, and to Bernard *to extent of* \$400," and the words in the application, "*as their interest may appear*," are words which apply, in connection with the language of the policy, to a reduction of these sums and not to a payment beyond them.

The plaintiff was and is therefore entitled to the surplus, which in this case, by the verdict, is \$130, above the \$1400.

Bernard and Watson might sue for these sums, if so much be due to them, or for such amount less than these sums as their interests may appear.

The defendants could not safely account with them without making the plaintiff a party to such accounting, because the sums are not fixed. They are to be ascertained, and she as well as they would have to join in the acquittance to the company for whatever money was paid to Bernard and Watson.

The plaintiff would therefore have to be a party along with Bernard in one suit, and with Watson in another suit, for the moneys in which they were interested, and to sue alone in a third suit for the residue which was due to herself. Or she might join them in the one action, as would



be done in equity, and settle the rights of all parties concerned at once: *Muskerry v. Skeffington*, L. R. 3 H. L. 144.

The general rule of that Court is, that all persons interested in the subject matter of a suit with respect to its object, are necessary parties to the suit.

Here the object of the suit is the payment over of so much money, and to get a discharge from it, if it is recovered.

The question is reduced to one of parties to the suit, and as the plaintiff is a proper party, and releases are offered on behalf of Bernard and Watson, we do not think it necessary to consider whether we should direct them to be made parties to the suit, as it is, under these circumstances, substantially a matter of form now.

Then as to the misrepresentation or concealment with respect to the mortgages to Bernard and Watson, we think as a fact that there was no concealment or misrepresentation.

It is true the question as to encumbrances is not answered, and it may be that in some cases no answer may be equivalent to concealment. But here the agent at the office to whom the application was delivered says he knew that the property was encumbered, because it was expressed in the application that \$1000 of the loss was to be paid to one person and \$400 to another.

As to Whitney's mortgage there was no misrepresentation or concealment, because the plaintiff made no representation of any kind with respect to it, as she knew nothing of it, and there could be no concealment in such a case.

It was admitted during the argument that the judgment could not be arrested for a departure.

It was contended, however, that the special replications to the eighth plea, which were replied under authority of the 38 Vic. ch. 65, O., were not valid answers to the plea, because the defendants claim to have their authority and incorporation from or under the Acts of the Dominion Parliament, and they say that the Local Legislature cannot control or regulate any matter connected with the contract which they had entered into.

The authority to plead in case any of the conditions of the policy have not been strictly complied with by the insured from necessity, accident, or mistake, that such non-compliance should not defeat the claim to compensation if the company have not objected to the claim for loss on account of such non-compliance, but for some other cause, or if the company do not, after claim made, notify the insured in writing that the statement or proof is objected to, and for what it is objected to, or if the Court or Judge before whom the matter is tried for any other reason considers it is inequitable that the insurance should be forfeited for such non-compliance, is not an encroachment on the powers of the Dominion Parliament. It is a matter relating to property and civil rights, and also of a local and private nature. There can be no doubt of that.

There remains then the other question, whether the plaintiff used all possible diligence in saving and preserving the property insured?

The defendants have stipulated for the active conduct of the insured to save the property in case of fire. She is not to be passive, to stand by looking on, when she could by reasonable exertions prevent it from spreading, or extinguish it. She is to be diligent—to use all possible diligence is the provision—in saving the property.

And the enquiry is, whether the plaintiff did at the time or times of the fire or fires use all possible diligence to save the property?

The case is that the property was ultimately destroyed by the third fire, from the first fire never having been fully put out.

And the defendants say with much reason, that if that be so there is evidence that the plaintiff did not use all possible diligence to save the property.

The plaintiff said, and as I understand it in connection with the first fire, that the men said, as they were going down the road, one to the other, *that fire is not out*. And Thomas Fell said that at the third fire the plaintiff said, and as I understand it with respect to the first fire, *that the*

*place was so full of smoke she could not stand it, and that she locked up the house and went away.*

There is, however, evidence that the first fire was out, or was believed to be out. Thomas A. Beatty says so. The plaintiff said she left the house when the first fire was supposed to be out, and that the men said to her on her enquiry of them after the second fire if they thought it was all right, and they said it was. The men present at the first fire, she says, said to her that that fire was all right. Ellen Keena also says the first fire was put out. Mr. Hancock says the second fire was out.

There was evidence therefore both ways. The learned Judge charged the jury fully and carefully on the whole case, and especially upon this part of it, and on the part of it relating to the wilfully setting the place on fire. I do not know what further evidence can be given.

In my opinion, the first and second fires were put out, and the third fire was the act of an incendiary, and the jury have said that the plaintiff was not that incendiary, and that fact must be considered as settled by the criminal trial, and also by the further trial of it in this cause. Whether another jury would have found for the plaintiff or not I cannot say, nor can I say what opinion a Judge would have passed upon the evidence. I know what opinion I should have formed upon it, and I believe it would be the right one, but we cannot interfere with the finding of the jury when all the evidence which ever can be given was heard by them, and when the direction to them upon the evidence and law was unexceptionable, and when there was evidence which if believed was in favour of the plaintiff, and that evidence was believed.

I feel obliged to consent to the rule being discharged upon the condition of the releases from Bernard and Watson for the \$1000 and \$400 respectively being filed before the rule is taken out.

HARRISON, C. J., and MORRISON, J., concurred.

*Rule discharged.*

## MEMORANDA.

During this term the following gentlemen were called to the Bar :

HAUGHTON IGNATIUS LENNOX, HENRY PETER MILLIGAN, CHARLES HENRY WOODWARD, LAFAYETTE ALEXANDER MCPHERSON, ELGIN MEYERS, JAMES FULLERTON, ROBERT SCARTH SMELLIE, JASI ALEXANDER MORTON, JOHN FOLLINSBEE, JR., DAVID ROBERTSON, HARRY DUDLEY GAMBLE, JOHN JAMES KEHOE, JOHN MAXWELL, ANCUS MARTIUS PETERSON, WILLIAM DANIEL FOSS, CAMPBELL WILLIAM SAWERS, JOHN W. H. WILSON.



The following rule was read in open Court, May 21st, 1877 :—

IN THE  
COURT OF QUEEN'S BENCH  
AND THE  
COURT OF COMMON PLEAS.

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*Regulae Generales.*

That leave shall not be given to demur and traverse the same pleading, unless on affidavit distinctly denying some one or more material statement or statements in such, and that unless in exceptional cases, in the discretion of the Court or Judge, affidavits merely as to the belief of the existence of just grounds of traverse shall not be sufficient.

(Signed) JOHN H. HAGARTY.  
ROBT. A. HARRISON.  
JOS. C. MORRISON.  
ADAM WILSON.  
JOHN W. GWYNNE.  
THOMAS GALT.

Monday, 21st May, 1877.

*Easter Term, 40 Victoria.*

The following rule was read in open Court on Saturday,  
9th June, 1877:—

## IN THE COURT OF QUEEN'S BENCH.

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### *Regulae Generales.*

Whereas, in the opinion of the Judges of the Court of Queen's Bench for the Province of Ontario, it is not necessary for the despatch of business pending in such Court to hold sittings during Trinity Term next. It is therefore, under and pursuant to section five of chapter eight of the Statutes of the Legislature of the Province of Ontario, passed at the last session thereof, ordered and directed, by the undersigned Judges of the said Court, that the said Court shall not sit during the time appointed for holding Trinity Term next by the fifty-third section of the Administration of Justice Act, 1873.

(Signed)      ROBERT A. HARRISON, C. J.  
                 JOSEPH C. MORRISON, J.  
                 ADAM WILSON, J.

OSGOODE HALL, 9th June, 1877.

*Easter Term, 40 Victoria.*

## SITTINGS IN VACATION

AFTER EASTER TERM, 1877.

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ALLAN V. MCTAVISH.

*Covenant in mortgage—Limitation—38 Vic. ch. 16, sec. 11, O.*

An action on the covenant in a mortgage for payment of the mortgage money must, under 38 Vic. ch. 16, sec. 11, O., be brought within ten years.

DEMURRER. Declaration: that the defendant, by deed bearing date on or about the 24th of November, 1856, covenanted to pay to one John Arnold, or his assignee, the sum of £50 5s., and interest, in four equal annual instalments, the first instalment whereof became due and was payable on or before the 24th of November, 1857; and the said J. A. duly assigned the said mortgage to the plaintiff, yet the defendant did not pay the said principal money or interest, or any part thereof.

Second plea: that the plaintiff's claim in the declaration mentioned is a sum of money secured by way of mortgage upon certain lands in Ontario, and this suit is brought to recover the same, and the alleged cause of action did not accrue within ten years before this suit.

Demurrer, on the ground, that this is an action of debt arising upon a covenant contained in a deed, and that the plaintiff is entitled to bring his action at any time within the period of twenty years after the cause of such action arose, notwithstanding 38 Vic. ch. 16, O.

May 25, 1877, the demurrer was argued.

*A. Galt* for the plaintiff.

*Ferguson*, Q. C., for the defendant.

June 19, 1877. MORRISON, J.—The language of the statute 38 Vic. ch. 16, sec. 11, O., is so express and clear that I cannot see any reason to doubt that the Legislature

intended that a limitation of ten years should apply to such a case as appears in these pleadings.

It is true, as argued by Mr. Galt, that by Consol. Stat. U. C., ch. 78, sec. 7, the limitation of actions of covenant or debt upon a bond or other specialty extends to twenty years, and that there is no good reason why such actions should have a longer limitation than an action on a covenant contained in a mortgage, which is a specialty, or that the twenty years' limitation should not still apply to such a covenant. Be that as it may, the Legislature, by the recent statute, 38 Vic. ch. 16, O., has expressly limited actions to recover money secured by any mortgage of any land to ten years, and as this action appears in the pleadings to be such an action, the defendant is entitled to judgment.

*Judgment for defendant. (a)*

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REGINA V. WALKER.

*Apprentice—Conviction for misconduct—Satisfaction—38 Vic. ch. 19, secs. 18-20, O.—Construction of.*

Sec. 20 of the Apprentices and Minors' Act, 38 Vic. ch. 19, O., applies only to the case of an apprentice who, having absented himself as mentioned in sec. 19, refuses to serve a further term after the expiration of his apprenticeship equal to the period of such absence, and a complaint under it therefore can only be made after such expiration, and a refusal to comply with sec. 19. A conviction under sec. 20, during the currency of the apprenticeship, was therefore quashed.

APRIL 30, 1877. *N. G. Bigelow* obtained from Hagarty, C. J. C. P., sitting alone, a rule *nisi* calling on John A. Fraser and Alexander MacNabb, Police Magistrate of the city of Toronto, to shew cause why the conviction made by the said Police Magistrate against the defendant should not be quashed, on the grounds, that the indentures of apprenticeship did not contain the consent of the defendant to be bound by them, and were therefore insufficient to warrant or uphold the conviction: that the "trade, business, or mystery of an artist" is not within the provisions of the

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(a) This decision was reversed by the Court of Appeal January 15, 1877.



statute respecting apprentices and minors: that the conviction was erroneous, because the absence of the defendant was condoned by Fraser, and the defendant was released from further service under said indentures; and that Fraser, by ordering the defendant to leave his service, was estopped from punishing defendant or claiming his services for the residue of his term of apprenticeship: that the justice had no authority to order compensation, but only that defendant should serve for so long a time as he had absented himself, unless he made satisfaction to his master.

From the papers filed it appeared that Thomas Walker, father of the defendant, had articted his son to John A. Fraser of Toronto, artist, to "learn the art, trade, business, or mystery of an artist," from the 1st of November, 1872, for six years thereafter. The indentures contained the usual covenant against the defendant absenting himself from his master's employment.

It appeared from the evidence of Fraser that the defendant worked for him under the indentures for some time, and in August, 1875, he ran away to the States, and that during the ensuing winter he returned to Canada and asked Fraser to take him back. Fraser said: "I told him I did not want to molest him, but if he stopped here I would arrest him." The defendant's services were sworn to be worth \$20 a week. It also appeared that at the opening of the trial the counsel for Mr. Fraser offered to drop the prosecution if defendant would return to his employment.

The conviction recited that a complaint was made by John A. Fraser that the defendant Walker was, on the 10th of February, 1873, "indentured to serve Fraser for \* \* six years from the 1st of November, 1872, to learn the calling of an artist, and that the said Walker, on the 28th August, 1875, did unlawfully, and without permission or discharge, absent himself from the employment of Fraser." The conviction went on to state that the parties appeared before the Police Magistrate, and he having heard the matter of the said complaint, adjudged and determined "that the said Walker did refuse and neglect to perform his duty to the said

Fraser, his master, in this, that the said Walker did, without permission or excuse, absent himself from the employ of the said Fraser from the 28th of August, 1875, to the 8th of October, 1875; and I do further adjudge and determine that the said Walker shall forthwith pay to the said Fraser the sum of \$120, as satisfaction of the said Walker to the said Fraser. If the said sum be not forthwith paid, then I adjudge the said Walker to be imprisoned in the common gaol of \* \* and there be kept for a period of three months, unless the said sum and charges of commitment, and carrying of the said Walker to the said gaol, shall be sooner paid."

May 22, 1877. *C. Robinson*, Q. C., with him *Roaf*, shewed cause.

*Bigelow*, contra.

June 19, 1877. MORRISON, J.—It seems to me that the conviction cannot be supported. It was contended that 38 Vic. ch. 19, sec. 20, O., the Act respecting apprentices and minors authorized such a conviction. I cannot think so.

The 19th section provides: "In case an apprentice absents himself from his master's service or employment before the term of his apprenticeship expires, he may, at any time thereafter, if found in Upper Canada, be compelled to serve his master for so long a time as he so absented himself, unless he makes satisfaction to his master for the loss sustained by such absence."

And section 20 provides, "In case an apprentice refuses to serve as above required, or to make such satisfaction to his master, or to obey the lawful commands of his master, or in any other way refuses or neglects to perform his duty to his master; and if the master \* \* complains on oath to a Justice of the Peace \* \* in any city \* \* where the absconding apprentice is found, such Justice \* \* shall by warrant \* \* cause the apprentice to be apprehended and brought before

him \* \* and such Justice, upon hearing the complaint, shall determine what satisfaction shall be made by the apprentice to his master. And in case the apprentice does not give or make such satisfaction immediately; or in case the satisfaction be of such a nature as not to admit of immediate performance, if he does not give sufficient security to make such satisfaction, then the Justice \* \* shall commit the apprentice to the common gaol \* \* for any time not exceeding three months; but such imprisonment shall not release the apprentice from his obligation to make up the lost time to his master."

Now, it appears to me that the 20th section only applies to the case of an apprentice, who, having absented himself as mentioned in the 19th section, and refuses to serve such further period after the expiration of his apprenticeship equal in point of time to the period he absented himself during its continuance; and consequently such a complaint could only arise and be made after the expiration of time mentioned in his articles and a refusal to comply with the provisions of the 19th section.

The language used in the 20th section, "absconding apprentice," that the justice shall determine; "what satisfaction shall be made;" and the provision at the end of the 20th section, that "such imprisonment shall not release the apprentice from his obligation to make up the lost time to the master," all evidently point to a non-compliance with the provisions of the 19th section.

It was, however, pressed that the words "or to obey the lawful commands of his master, or in any other way refuse or neglect to perform his duty to his master," embrace and extend to acts of disobedience, &c., generally. I read them, however, as being only applicable to the apprentice's services during the additional period which he is compelled to serve in lieu of the time he absented himself beyond the period prescribed by his articles, and to provide for obedience and the performance of his duties during the extended period, the 19th section previously providing for the apprentice's good conduct during the period mentioned in the apprenticeship articles.

The complaint here made is made during the currency of the apprenticeship, as the defendant's articles do not expire until November, 1878, and for improper conduct and neglect to perform his duty, and for which he was liable to be punished under sec. 18.

I may here remark that sec. 10 is apparently taken from the English Act, 20 Geo. II. ch. 19, sec. 4, and secs. 11 & 12 from 6 Geo. III. ch. 25, sec. 1; and in *Gray v. Cookston*, 11 East 12, the latter statute was held not to repeal the provisions of 20 Geo. II. ch. 19, sec. 4, as it was only a cumulative remedy given by the statute to the master for the loss of the service of his apprentice.

For the case before us the Legislature, by sec. 18, provided the punishment of a month's imprisonment, and it can hardly be supposed that the Legislature, having so provided a punishment to enforce apprentices during the term of their apprenticeship to obey their master's commands and perform their duties, &c., should also by the 20th section provide severer punishment for like offences during the same period. One can readily see why provision should be made to compel absenting and absconding apprentices to serve their masters after their apprenticeship has expired for an equivalent period, as mentioned in sec. 19, or make satisfaction to their master, and to award a specific punishment for refusing to serve such additional time and for disobedience, &c., during such period of service.

On the whole, I have arrived at the conclusion that the case made against the defendant is not one within the 20th section, or punishable in the manner provided by that section, and that upon that ground the conviction ought to be quashed.

I do not think it necessary to consider the other points raised by the defendant's counsel.

*Rule absolute.*

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## GARLAND ET AL. V. McDONALD.

*Covenant to pay a sum to be ascertained on settlement of accounts—  
Construction—Right of action*

The defendant executed a chattel mortgage to the plaintiffs, reciting that he was indebted to them in a large sum of money, the amount whereof had not been ascertained by settlement of accounts between them. The proviso was, that if the defendant should pay to the plaintiffs such sum as should be found due on a settlement between them, the instrument should be void; and defendant covenanted to pay to the plaintiffs the said sum of money so to be found due as aforesaid. In an action on this instrument, the plaintiffs alleged in one count that the defendant was at the date of the deed indebted to them in \$1,000, which would have been found due on a settlement, but that defendant, though requested, would not come to a settlement, nor pay the said sum. In another count it was alleged that defendant was indebted to the plaintiffs in \$1,000 for goods sold, &c., and defendant by deed acknowledged such indebtedness; and by reason of the non-payment an action had accrued to the plaintiffs to demand the same. The deed having been set out at length in the plea:

*Held*, that it sustained the declaration, and entitled the plaintiffs to maintain the action, the amount of damages being a matter to be proved at the trial.

DEMURRER. The declaration contained several counts, two of which were in covenant on a deed executed by defendant in August, 1866. The instrument was set out in full in the fourth plea, and appeared to have been, in form, a chattel mortgage. It recited that the defendant "is indebted to the plaintiffs in a large sum of money, the amount whereof has not been ascertained by settlement of accounts between them; and whereas the plaintiffs have requested the said defendant to secure the said debt, and also all such further sums wherein the said party of the first part (the defendant) may become indebted to them during the continuance of these presents, by mortgage on the goods and chattels hereinafter particularly set forth; and the said defendant hath agreed so to do." Then followed a description of the goods so mortgaged. The proviso was: "Provided always, and these presents are upon this condition, that if the said party of the first part (the defendant) do and shall well and truly pay or cause to be paid unto the parties of the second part (the plaintiffs) such sum of

money as shall be found due to them on a settlement between the said parties," &c., &c., then the said instrument was to be void. Then followed the following covenant: "And the said party of the first part (the defendant) doth hereby covenant promise and agree to and with the said party of the second part (the plaintiffs) that he, the said party of the first part, shall and will well and truly pay or cause to be paid unto the said parties of the second part, the said sum of money so to be found due as aforesaid," &c. Then followed the usual provisions for enforcing payment in case of default by the sale of the property, &c.; the last clause providing that the plaintiffs might, instead of selling, take the goods and keep possession of them.

In the second count the plaintiffs declared "that the defendant by deed (the one above set forth) did admit and acknowledge that he was indebted to the plaintiffs in a large sum of money, the amount whereof had not then been ascertained by settlement of accounts between the plaintiffs and defendant; and the defendant by such deed covenanted with the plaintiffs to pay the plaintiffs such sum of money as shall be found due by the defendant to the plaintiffs on a settlement between them, with interest at the rate of six per cent. per annum, at the expiration of one year from the date of such deed. And the plaintiffs allege that the defendant was, at the date of such deed, indebted to the plaintiffs in the sum of one thousand dollars, and that such sum would, upon a settlement of accounts between them and the defendant have been found due from the defendant to the plaintiffs. And the plaintiffs say that they were at all times ready and willing, and offered, and requested the defendant, to come to a settlement of accounts between them and the defendant, and to ascertain the amount which would upon such settlement be due from the defendant to them; but the defendant wholly neglected and refused to make or come to such settlement, and it is wholly through the neglect and default of the defendant that no such settlement has been come to. And the plaintiffs say that the whole of such sum of one

thousand dollars then was, and is still, due and owing by the defendant to the plaintiffs, and that such sum would, upon a settlement of accounts between the plaintiffs and the defendant, be found due from the defendant to the plaintiffs, but the defendant has not paid such sum or any part thereof.

The third count alleged that on (the date of the deed) the defendant was indebted to the plaintiffs in a large sum of money, to wit, the sum of \$1,000, for goods sold and delivered, &c., &c., (the common counts); and the defendant, by his deed bearing date the 10th of August, 1866, acknowledged such indebtedness by him, the defendant, to the plaintiffs, and by reason of the non-payment thereof an action hath accrued to the plaintiffs to demand the same of the defendant; yet the defendant hath not paid the said sum of one thousand dollars, or any part thereof, to the plaintiffs' damage of one thousand dollars.

The fourth plea to the second count set out a copy of the deed, which is sufficiently set out elsewhere, and averred that the parties thereto respectively are the defendant and the plaintiffs in this suit.

The sixth plea thereto was that the action did not accrue within six years.

The ninth plea, to the third count, was the same as the fourth.

The tenth plea, to the third count, was the same as the sixth.

These pleas were demurred to, on the ground that, as respects the fourth and ninth pleas, they confess but do not shew any answer to the causes of action alleged; and as regards the sixth and tenth pleas, that they afford no answer to the plaintiffs' claim.

The defendant gave notice that he excepted to the second and third counts respectively, on the ground that no such covenant as is set forth in said counts respectively is contained in the indenture referred to in said respective counts, and which is set forth verbatim in the fourth plea to the said second count; and that no covenant to the effect set out in said respective counts can be implied there-

from ; and no such duty as therein is respectively alleged was or is imposed on the defendant.

August 28, 1877, the demurrer was argued by *Walker*, for the plaintiffs, and *E. Martin*, Q. C., for the defendant.

September 4, 1877. GALT, J.—The sixth and tenth pleas are no answer to the action, which is brought on a sealed instrument ; and as respects the fourth and ninth pleas, they certainly contain no answer, but they bring the whole instrument before the Court, so that effect may be given to the exceptions taken to the declaration ; and the argument before me turned on them.

This was clearly the proper course for the defendant to take, in accordance with the judgment of the Court in *Kempster et al. v. Bank of Montreal*, 32 U. C. R. 87.

I have then to consider whether the deed as set out and admitted contains such an admission and covenant as enables these plaintiffs to sustain this action, and I am of opinion that it does. I have nothing to do with the amount which the plaintiffs may be entitled to recover ; all I am called upon to say is, whether on these pleadings the plaintiffs are entitled to claim anything from the defendant under the terms of the deed.

By the very terms of the deed the defendant admits that he is indebted to the plaintiffs in a large sum of money, the amount of which had not been ascertained. Whether the fact that this has not been done may preclude the plaintiffs from recovering substantial damages is a matter to be hereafter ascertained under the evidence which may be adduced on the trial ; but, as was said by Lord Tenterden in *Dickinson v. Hatfield*, 5 C. & P. 46, 47, “Here there is an acknowledgment of a balance due, but what that balance was we are at a loss to know. The plaintiff is entitled to a verdict for a shilling damages.”

It was contended by Mr. Martin that under the terms of the deed the plaintiffs' remedy, if any, was confined to a sale of the goods and chattels mentioned in the mortgage ; and he cited *Browne et al. v. Price*, 4 C. B. N. S. 598, and



*Mathew v. Blackmore*, 1 H. & N. 762, to sustain this argument. But on referring to the deed it will be seen that the covenant to pay is absolute, and the power of sale is introduced by the words, "and that also in case default shall be made," &c., so that the plaintiffs were entitled to sue on the covenant, and the power of sale was by way of additional security.

I am not called upon to consider what might have been the result if it had been alleged that the plaintiffs had exercised the option given them by the last clause of the deed.

*Judgment for plaintiffs.*

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#### IN RE NICHOL AND THE CORPORATION OF THE TOWNSHIP OF ALNWICK.

*Arrangement between municipalities under 36 Vic. ch. 48, sec. 430, sub-sec. 2, O.—Construction of—Rate of interest allowed on debentures—By-law to raise money—Notices.*

The corporation of the township of A. passed a by-law under the Municipal Act of 1873, sec. 430, sub-sec. 2, providing that an arrangement should be entered into by the council with two other townships for executing at their joint expense, and for their joint benefit, the work upon a gravel road through the township of A. It recited that \$3,000 would be required to defray the expenses of the township in the work: that it was intended to borrow that sum on debentures of \$100 each, to be issued as the work progressed, and payable by instalments of \$600 in each year, with interest at seven per cent; and that it would require to raise annually by special rate \$642 for paying said debt and interest. *Held*, that the by-law shewed clearly that the interest was to be raised annually on the \$600, not on the \$3,000.

*Held*, also, following, but not agreeing with, *The Corporation of North Gwillimbury v. Moore*, 15 C. P. 445, that the corporation were authorized to allow a higher rate of interest than seven per cent.

Remarks as to the necessity of legislation on this subject.

The by-law did not name a day when it should take effect, and no notices were given as required by secs. 424 and 425 in case of a by-law for opening or altering a road, but the notices were under sec. 231, sub-sec. 2, as of a money by-law to be voted on. *Held*, that both these objections were fatal.

*Held*, also, that the Municipal Council in such cases must acquire the title to the road before raising the money; and *Seemle*, that the arrangement with the other municipalities must also be first completed.

*Osler*, on the 17th of February last, obtained a rule calling on the corporation of the township of Alnwick to shew cause

why the by-law No. 107, for entering into and performing an arrangement with the municipal councils of the townships of Haldimand and Hamilton for the construction of a gravel road from the town of Cobourg to the village of Hastings, at their joint expense and for their joint benefit, or as much of the said by-law as provides for raising money by the issue of debentures as therein mentioned, should not be quashed, with costs to be paid by the township of Alnwick, on the following grounds :—

1. The arrangement authorized by the by-law is not one which the corporation has power to make or enter into.

2. Until the proposed arrangement, if legal, and within the power of the corporation, has been entered into and completed with the other townships named in the by-law, no by-law can legally be passed to raise money to pay for the work.

3. The third and fourth clauses of the by-law are uncertain and defective, and it does not appear whether the interest is to be raised yearly on the whole amount of the debentures authorized to be issued, or whether the sum of \$600 and interest upon that sum only is to be raised in each year, and the provisions of the said clauses are not in accordance with section 250 of the Municipal Act.

4. The by-law provides that the debentures shall bear interest at 7 per cent., and the corporation has no power to impose a higher rate of interest than six per cent. per annum, and the by-law provides for the payment of interest on the loan at a rate exceeding the legal rate of interest.

5. The by-law does not name any day in the financial year on which it was passed, when it should take effect.

6. And that the by-law, being one for establishing and opening a highway, was passed without the requirements of section 424 of the Municipal Act having been complied with.

The by-law provided "that an arrangement shall and may be entered into by the said council with the municipal councils of the townships of Hamilton and Haldimand for the executing, at their joint expense and for their joint

benefit, the work upon a gravel road through the township of Alnwick as a part of a gravel road between the town of Cobourg and the village of Hastings, in the county of Northumberland, upon the line hereinafter mentioned and described."

Section 2 provided "that the said gravel road shall be made, opened, and established, within the township of Alnwick, upon the line following, \* \* \* as surveyed by John Daintry, Esq., Provincial Land Surveyor. The line to be the centre of the road, and the said road to be one chain in width, and four hundred and sixty-nine chains in length."

And whereas \$3,000 would be required to defray the expenses of the township upon the work, "and it is intended by the said council to borrow that amount upon debentures of \$100 each, to be issued from time to time by the said council as the work progresses, and payable by instalments of \$600 in each year, with interest thereon at seven per cent. per annum; and whereas it will require to raise annually by special rate the sum of \$642 for paying the said debt and interest." \* \*

The municipal council further enacted:--3. "That the said council may from time to time, as required, issue debentures of the said corporation for the sum of \$3,000 in all, and of the amount of \$100 each, payable as follows: \$600 in the year 1877; \$600 in the year 1878; \$600 in the year 1879; \$600 in the year 1880; \$600 in the year 1881, and bearing interest at the rate of seven per cent. per annum, and with coupons attached for the interest thereon, payable yearly, at the office of the bank of Toronto, in the town of Cobourg, and may borrow money thereon for the payment of the expenses of the said work as it progresses, but not exceeding in any one year the said sum of \$600."

Then the special rate was fixed for paying in each year "the instalments of principal and interest of the said debt as they respectively become payable."

Provision was then made for taking a vote on the by-law on the 20th of December, 1876.

*Henry Hough*, the proprietor and publisher of the newspaper "*The Cobourg World*," published in Cobourg, made affidavit that at the request of the council of the township of Alnwick he published a copy of the by-law, with a notice attached, of the day and places of voting. The first publication was on the 24th of November, 1876, and it was published for three consecutive weeks and no more from that date.

*John Daintry*, Provincial Land Surveyor, made affidavit that in October, 1876, he laid out and surveyed for the township of Alnwick "a line of road through said township of Alnwick \* \* \*: that the line of road runs partly on the present travelled road in said township, and partly through fields and new country, in which latter case the right of way will have to be purchased or otherwise acquired."

*Henry James Vanderburg*, made affidavit that he opposed the by-law, "on the ground that Alnwick would be bound to expend \$3,000, on the road, and the other municipalities of Hamilton and Haldimand were not and refused to be legally bound by by-law to construct their portions of said road": that he had recently passed over the said new road, and he did not consider the townships of Hamilton and Haldimand had expended more the past year than they did usually on the line.

*William Drope* made affidavit. He denied that Hamilton and Haldimand had carried out their undertaking in respect of the said road; and stated that Haldimand had not in the past year exceeded its usual average expenditure, and did not expend \$400 in the past season: that it had not expended or constructed more than one-fourth of the work that would be required to complete the line of road within it: that Hamilton had not completed their portion of road, and had not performed more work on the said line of road within it than it had usually expended for some years past, irrespective of any agreement with other municipalities: that he has reason to believe that Cobourg, Hamilton, and Haldimand, had not passed any by-laws



committing them to construct the sections of road within their respective limits; and he was present when the reeve of Haldimand refused to submit a by-law to the council of that township, and gave as a reason that such a by-law could not be carried by the ratepayers of the township.

For the township of Alnwick several affidavits were filed.

*Henry Smith* made affidavit: that he was solicitor for the town of Cobourg: that in the summer of 1876 a meeting of the councillors and other representative men of the municipalities of Cobourg, Hamilton, Haldimand and Alnwick, was held in Baltimore, near Cobourg, for the purpose of devising means and making arrangements for improving the road from Cobourg to Hastings, passing through part of the said townships. That meeting was adjourned to meet in Cobourg, to give time to the municipalities to ascertain what terms they would respectively offer, Cobourg, Hamilton, and Haldimand, then giving in writing what they proposed by way of assistance to the undertaking. A meeting afterwards took place at Cobourg, and arrangements were made upon the basis that Alnwick should contribute a sum larger than the by-law subsequently passed provided for. In reliance upon that arrangement Haldimand constructed that part of the road within it, and Cobourg paid to it an amount in proportion to the extent of work so done. Hamilton performed also its share of the arrangements, and Cobourg paid to it the proportion it was entitled to under the arrangement. He urged the passage of the by-law in Alnwick, on the ground, amongst others, "that the other municipalities had in good faith carried out their part of their bargain, and that it would be bad faith on the part of the people of Alnwick if the by-law were not passed and the bargain carried out by them."

*David H. Minaker*, the secretary of the adjourned meeting, held at Cobourg, on the 9th of August, 1876, made affidavit that the following resolution was passed: "That this meeting, composed of the representatives of the councils of Alnwick, Haldimand, Hamilton, and Cobourg, agree on the following basis for the building of the Cobourg and Hastings

gravel road from Baltimore to Percy town line west, as follows: Alnwick to submit a by-law for \$4,000, as proposed at the Baltimore meeting, to enable them to build the road through their own township. Haldimand to procure right of way and expend not less than \$400 a year inclusive, until the road is completed through Haldimand. Hamilton to expend not less than \$300 a year until completed. Cobourg to appropriate \$100 a mile towards gravelling as soon as each township has any portion of the road ready for gravelling. And that the following be named a committee to arrange all details and approve of the expenditure: reeve and one councillor from each municipality, and the mayor and one councillor from Cobourg. It was further agreed that if the council of Cobourg do get the \$1,500 supposed surplus of the Savings Bank, that they would increase the offer from Cobourg to \$150 per mile through Haldimand.

*Thomas Gilbard*, treasurer of the town of Cobourg, made affidavit: that in December last he paid to the treasurer of Hamilton \$100 in part of the amount agreed to be paid by Cobourg towards the Cobourg and Hastings gravel road, and on January last he paid to the treasurer of Haldimand \$114.31 in part of the amount agreed to be paid by Cobourg towards the said road: that the town of Cobourg expected to pay additional sums to these townships for work done on the said road during the present year: and the reeve of Hamilton had just stated in his presence that the council of that township had this year gravelled about one mile of the said road, and that the township looked to Cobourg for its agreed proportion of the expense.

*George Guillett*, mayor of Cobourg, made affidavit, among other things, that the town of Cobourg entered into the arrangement in good faith, relying upon the other municipalities keeping faith on their part: that the town, in such reliance had paid considerable sums for and towards the improvements of said road, and were disposed to carry out their bargain to the fullest extent.

*John Thackeray* made affidavit, among other things, that

in consequence of this motion the township of Alnwick had taken no action to pass a by-law to acquire the lands not covered by the old road; but no difficulty whatever was anticipated in that respect, excepting as to four persons named, including the applicant; and that the council intended to pass such a by-law so soon as this motion is disposed of, the other owners being not only willing, but anxious to give their land in lieu of the old road: that a by-law for \$4,000 would have been passed, but experienced parties advised the township that \$3,000 would be sufficient. Haldimand and Hamilton have carried out their undertaking in respect of the road, relying on Alnwick performing its part of the agreement: that the road proposed by the by-law was almost the present travelled road—it only diverged in one place to avoid a very bad hill, and in another to cut off a sharp corner.

It appeared that no newspaper was published in Alnwick, and that due notice was given of the voting on the by-law.

September 18, 1877. *Robinson, Q.C.*, shewed cause. The arrangement was made under the Municipal Act of 1873. Sec. 430, sub-sec. 2. The chief objection to the by-law is, that no arrangement, it is said, has been made between Alnwick and the other municipalities to carry out the object of the by-law: that such fact appears on the face of the by-law, and that in that state of things Alnwick cannot pass a by-law to raise money—that the money can only be raised after the arrangement has been made. [Some discussion took place upon that part of the case, and it was suggested that if the by-law was valid in all other respects, the objection above taken might be cured by by-laws being yet passed by the other municipalities, the other parties to the arrangement, if it were held that such by-laws should be passed; and that such subsequent passing of them would ratify and confirm the one complained of for that cause. Or that an agreement should be made between the respective municipalities on the subject, if that would be sufficient. That part of

the case then remained over, and the other objections were argued.] It is objected that the third and fourth clauses of the by-law are uncertain and defective, as it does not appear whether the interest is to be raised yearly on the \$3,000, or whether the sum of \$600 and interest upon it only is to be raised in each year. The by-law is not objectionable in that respect; it provides for the issue from time to time of debentures amounting in the whole to \$3,000, as required; and \$600 is the sum which is to be required in each year of the principal, and the interest is to be raised upon the \$600 only in each year; for in the by-law it is expressly provided that \$642 will be required annually. The fourth section of the by-law shews also that the special rate is to pay the *instalments* of principal and interest of the debt as they become due, and these instalments are \$600 for principal, and \$42 for interest. It is therefore clear the objection just mentioned cannot prevail. The by-law in that respect is in accordance with section 250 of the Municipal Act: *Secord and The Corporation of the County of Lincoln*, 24 U. C. R. 142. The rate of interest at seven per cent. is also objected to. It is said that municipal bodies are not at liberty by law to pay more than six per cent. *Wilson and The Municipal Council of the County of Elgin*, 13 U. C. R. 218, supports the objection under the law as it then was under 16 Vic. ch. 80. If the law were still the same, the by-law would be defective in that respect; but sec. 6 of Consol. Stat. U. C. ch. 58, does not apply to municipal corporations, and they are therefore at liberty to allow any rate of interest. It was next urged by the applicant that the by-law was bad because it did not specify a day in the financial year when it should come into operation and take effect. In *Re Michie and the Corporation of the City of Toronto*, 11 C. P. 379, the Court declined in their discretion to quash the by-law for such a defect, the words of the Act being that the Court may quash a by-law for illegality. Lastly, it was said that the by-law was one for opening or altering a road, and that the requirements of the Act of 1873, sec.



424, had not been complied with. The by-law was really for improving the existing road by gravelling it, although there were two slight deviations in the former line of road, in one place to avoid a bad hill, and in another place to avoid too sharp a turn. The cases of *Lafferty v. Municipal Council of Wentworth and Halton*, 8 U. C. R. 232; *Re McKinnon and the Corporation of the Village of Caledonia*, 33 U. C. R. 502; *Grierson and The Provisional Municipal Council of the County of Ontario*, 9 U. C. R. 623; *Re Simmons and the Corporation of the Township of Chatham*, 21 U. C. R. 75; *Hodgson and the Municipal Council of York and Peel, and the Municipal Council of Ontario*, 13 U. C. R. 268, and also *Re Michie and the Corporation of the City of Toronto*, 11 C. P. 379, before cited, shew that the Court is not obliged to quash the by-law even for illegality, and that it will exercise a discretion, according to the circumstances of each case, whether it will interfere or not.

*Osler*, supported the rule. The by-law is uncertain, because it does not declare plainly upon what sum interest is to be raised yearly, whether upon \$600 or upon \$3,000. And it is bad because it provides for the payment of more than six per cent. The Municipal Act of 1866, sec. 217, allowed municipalities to bargain for the payment of more than six per cent.; but that clause has been dropped by the Act of 1873. It is contended that municipal bodies cannot contract for the payment of more than six per cent. *The Corporation of the Township of Westminister v. Fox*, 19 U. C. R. 203, shews that a loan by a municipal body at ten per cent. interest is bad as to the excess above six per cent., and is not void altogether. In the *Corporation of North Gwillimbury v. Moore*, 15 C. P. 445, it was held that the Corporation could just as individuals might on a contract take more than six per cent. interest. Consol. Stat. C. ch. 58, sec. 6, applies to such bodies, for they were authorized by law before the 16th of August, 1858, to lend or borrow money, and therefore they cannot pay more than six per cent. The by-law is bad because no day in the financial year has been named when it shall

take effect. By the Municipal Act, 1873, sec. 248, no such by-law shall be valid which does not so express such day. The case of *Re Michie & The Corporation of the City of Toronto*, 11 C. P. 379, was cited for the defendants to shew the Court would not as of right give effect to that objection ; but there were exceptional grounds in that case, which there are not in this, upon which the Court acted. There has been no proper answer given to the objection that the by-law is for the opening and altering of a road, and no notices as required by the statute have been given by the township ; and it appears from the papers filed that there are four persons who will not give their land unless obliged to do so.

September 21, 1877, WILSON, J.—I am of opinion the by-law is free from doubt as to the sum on which the interest is to be annually raised. It is to be on the \$600, and not upon the \$3,000.

As to the interest. If section 217 of the Act of 1866, had remained in force there could have been no doubt upon the question. But it was not continued in the Act of 1873. In the schedule of that Act, the above section 217, is marked as *effete*.

That section was : “ Any such debenture, issued as aforesaid, shall be valid, and recoverable to the full amount, notwithstanding its negotiation by such corporation at a rate less than par, or at a rate of interest greater than six per centum per annum. or although a rate of interest greater than six per centum per annum is reserved thereby or made payable thereon.”

Consol. Stat. C. ch. 58, sec. 3, makes free trade in money on any contract or agreement.

It was said a by-law was not “ a contract for the loan or forbearance of money ” under the 16 Vic. ch. 80 ; and the by-law was quashed because it provided for raising a loan at eight per cent : *Wilson and the Municipal Council of the County of Elgin*, 13 U. C. R. 218.

It is true a by-law is not commonly a contract, nor

properly a contract, but whether it may not be one need not be discussed. But whether it is one or can be one is not properly the question, for if the contract to be made under the by-law is valid, the by-law must certainly be valid too, as it is only the authority to contract, and not the contract itself.

What I have to consider here is, whether the debentures to be issued under the by-law authorizing the issue at seven per cent. will be valid or not as a contract or agreement by the township by way of loan with the person accepting them.

A corporation is a *person*, and would therefore be authorized to *allow* under Consol. Stat. C. ch. 58, sec. 3, before referred to any rate of interest or discount agreed upon.

The exceptions in that statute apply to banks by sections 4 and 5.

Then section 6 enacts: "Nothing in the three last preceding sections of this Act shall be construed to apply to any corporation, or company, or association of persons, not being a bank, authorized by law before the 16th of August, 1858, to lend or borrow money."

Does this section exclude, restrict, or affect municipal bodies from or so far as respects the benefit of that section?

Were municipal bodies authorized by law before the 16th of August, 1858, to lend or borrow money?

If they were, then they are not within the terms of section 3, and cannot *allow* more than six per cent. If they were not, then they are within the enactment of section and may therefore *allow* more than six per cent.

I should have said, apart from all decision on the point, that municipal bodies, which possess by law such enormous borrowing powers, and are to invest their surplus funds on security or in securities, were corporations which "were authorized by law to lend or borrow money," as they had such powers before the 16th of August, 1858.

But the case of the *Corporation of North Gwillimbury v. Moore*, 15 C. P. 445, is a decision the other way, in which I must have concurred.

At page 449, it is said the Legislature "did not intend to restrict corporations not incorporated for the business of lending money, but only allowed by law to lend money, from charging more than six or seven per cent. for money. In fact as to these latter corporations, we are of opinion that the Legislature did not intend to impose any greater restrictions on them than on any other persons," &c.

It may probably have been in consequence of that decision that section 217 of the Act of 1866 was marked *effete* in the schedule to the Municipal Act of 1873.

But section 217 of the Act of 1866 was passed after, and notwithstanding the decision just referred to, and it would have been safer to have continued that section in the Act of 1873 than to have marked it *effete*.

The 36 Vic. ch. 70, D., which authorizes "any corporation constituted for religious, charitable, or educational purposes, \* \* \* authorized by law to lend or borrow money," to bargain for any rate of interest or discount not exceeding eight per cent., is also a legislative opinion that without an empowering statute such corporations, constituted for religious, charitable, or educational purposes only, and whose business therefore was not to lend or borrow were prohibited from contracting for more than six per cent., although by their charter they had the power to lend or borrow money.

The case of *The Corporation of the Township of Westminster v. Fox*, 19 U. C. R. 203, is not a decision upon the section of the Act I am now referring to. It was decided on the 16 Vic. ch. 80, from the reading of the judgment and as appears also from the reference which the Chief Justice expressly made to that statute.

I must hold, therefore, because concluded by authority, that the provision in this by-law for the payment of seven per cent. is not illegal; and considering also that the Provincial Legislature by treating section 217 of the Act of 1866 has taken the same view of the state of the law.

Bu I must, nevertheless, say that in my opinion at the



present time the true law is, that such a provision of the by-law is within the prohibition of the statute; and that it would be safer to re-enact section 217 before referred to, and to legalize all that had been done within its operation since it was dropped as *effete*.

The decided law may still be reviewed in Appeal, and it would be a serious embarrassment to the holders of municipal debentures to have the decision before referred to reversed, and it must be embarrassing to them to have it questioned.

Then as to no day being named in the by-law in the financial year in which it was passed when the by-law is take effect. Section 248 of the Act declares that if the by-law do not do so, "no such by-law shall be valid."

In *Re Michie and The Corporation of the City of Toronto*, 11 C. P. 379, the like objection was taken. Draper, C. J., said, p. 386: "Upon the whole, though leaning in favour of the first objection which strikes at the whole by-law, yet when I consider the mischief or serious inconvenience which probably would result from quashing the by-law at this late period, I think we ought, as a matter of discretion, if we possess such a discretion, rather to discharge than to make absolute the rule. \* \* \*

The Act says the Court *may* quash a by-law in whole or in part for illegality. Treating the expression as conferring an authority with a discretion to abstain from its exercise, I think this a fitting occasion to exercise that discretion."

In this case there are none of the special reasons which existed in that case for abstaining from the exercise of power which the Court possesses to set aside such a by-law

In this case nothing has been done at all, and when the statute declares that for such a defect the "by-law shall not be valid," it is my duty, I may say, to give due effect to the provision of the statute.

Upon this objection I think the by-law must fail.

As to the last objection, that this by-law is for opening and altering a road, and no notice has been given as sections 424 and 425 of the Act of 1873 require. I think I must

give effect to that objection also. Notices were given of the by-law as a money by-law to be voted upon; and the notices in that case, sec. 231, sub-sec. 2, are very different from those given with respect to the alteration of roads under section 424; and, as I have said before, nothing has as yet been done upon the by-law, and I am not driven therefore or obliged to exercise a liberal—perhaps a too liberal—discretion to maintain the by-law notwithstanding its defects, by reason of the hardship and inconvenience which might follow by vacating it.

It appears to be necessary that the municipal body shall get the title to the road or proposed road before raising money to appropriate it as a road.

Here the council have anticipated the getting of the land for the new portion of the road, and they have provided for raising the money to make it before they have got the right to do it. I think that objection is sustainable.

I have not, as was arranged on the argument, considered the main question, whether the by-law for raising money can be sustained to carry out an arrangement with the other named municipalities which has not yet been efficiently completed.

I expressed my opinion on the argument very strongly against a by-law, which enacts “that an arrangement shall and may be entered into,” and then directs money to be raised to carry it out, when it has not yet been made.

The other municipalities it appears are in no way bound to carry out the arrangement said to have been agreed upon, and the parties are disputing the performance by the the other bodies of their portion of the work, and the township of Alnwick has no remedy against them if they really are in default.

I give no judgment on this point, but I intimated before and intimate again what my opinion may probably be if I am required to decide it. The work, as far as I can judge, is to extend over a number of years, and it is important the rights of each contracting municipality should be fully secured and their liability be made plain and declared, and it

is manifestly a most un-businesslike manner of doing work of so much importance to every resident in those municipalities.

The rule will be absolute to quash the by-law, because no day has been named in it in the financial year in which it was passed to take effect; and because no by-law has been properly passed to take the new land for the road; and no proper notices of such intended by-law have been given according to the statute; and because money for opening or altering such road cannot be raised until the title to the road has been secured.

I might not interfere on the latter ground if the council could still secure the title, but it is certain they cannot do that without proceeding formally to obtain it.

Rule absolute, on the grounds mentioned, to quash the by-law, with costs.

*Rule absolute.*

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### JOHN O'DONOHUE V. JOSEPH A. DONOVAN.

*Examination under A. J. Act 1873—Refusal to answer—Attachment—Intituling papers—Waiver.*

On an examination of the defendant under the A. J. Act 1873, in an action for slander, he was asked what pleas he had pleaded, whether his plea of not guilty was true or untrue, and whether he knew that he had pleaded such a plea. He refused to answer until the pleas were produced. On application to attach him for contempt:

*Held*, that he was not bound to answer what pleas he had pleaded, and that verified copies of the pleadings should have been before the examiner, when the question would have been unnecessary.

In the writ of summons and declaration the defendant was described as "Joseph Aloysius Donovan," and in the affidavits for this rule and in the rule as "Joseph A. Donovan." But in the order for his examination, and the appointment made on it he was also described as Joseph A. Donovan, and it was admitted that he attended upon them and was examined, and stated that he was the defendant, the depositions being entitled in the same way. *Held*, that the objection, which would otherwise have been fatal, had been waived.

ACTION of slander. October 2, 1877. *H. J. Scott* obtained a rule calling on the defendant to shew cause

why an attachment should not issue out of this Court against him for contempt of Court in refusing, upon an examination held before William B. Heward, Esquire, on the 26th of September last, in this cause, pursuant to an order for the examination of the defendant under the Administration of Justice Act of 1873, made by Robert G. Dalton, Esquire, Clerk of the Crown and Pleas, Queen's Bench, to answer these questions then asked him :—

1. What are your pleas in this action ?
2. Is your plea to the declaration in this cause of not guilty true or untrue ?
3. Do you know that you have pleaded such a plea ?
4. Do you refuse to say whether you have pleaded guilty or not guilty, in the absence of the original pleas filed in Court ?

Or why the demurrers or objections of the defendant to the above questions should not be declared invalid, and the defendant be ordered to submit to be examined and to answer the said questions at his own expense, and to pay the costs of and occasioned by such objections.

The above questions are, for the purpose of this application, numbered 1, 2, 3, 4, as above.

The answers the defendant gave were as follows, to—

1. They are filed, and if you produce them I will tell you.
2. If you produce the plea pleaded, so as to assure me I have pleaded it, I will tell you.
3. If you produce the pleas I have pleaded, I will tell you. If you do not produce them, I will not tell you.
4. I refuse to say anything about the pleas till they are produced.

The defendant filed an affidavit, in which he stated that he was not served with any notice to produce before the examiner the pleas he had pleaded in this action : that it was not in any spirit of contumacy he declined to answer the questions put to him : that as to the first of the questions set forth in the rule, he answered as he did " because said pleas having been submitted to counsel, and subsequently engrossed by my clerk, and, I presume, by him



filed, I had and have no absolute knowledge that all the pleas I intended to plead were engrossed by my said clerk, or, if engrossed, that they were by him filed; and in requiring the production of the pleas filed in this action before answering said question, I only required that without which I could not safely answer the question proposed."

That as to the second question,—“Inasmuch as I had not admitted having pleaded such a plea, I considered the question improper; and, moreover, I could only answer the question upon seeing the pleas I had filed, so as to ascertain positively if the plea of not guilty was actually pleaded and filed in this action for me and in my behalf.”

That as to the third question,—“I could not safely answer such a question without seeing the pleas pleaded by me and filed, for it could easily and possibly happen that though such a plea had been in the draft of my pleas, that through mistake or inadvertence my clerk had omitted to engross and file it.”

That as to the fourth question,—“I consider I was justified in refusing to answer such a question in default of any notice to produce the pleas by me pleaded, and in the absence of the original pleas filed in Court.”

October 5, 1877, *W. T. Boyd* shewed cause. The defendant was justified in refusing to answer the questions set out in the rule, and which the plaintiff on this application complains he did not answer, until the pleas which were referred to by the questioner were produced to the defendant. The defendant was called upon to speak as to the contents of a written document: *Taylor* on Evidence, 3rd ed., sec. 370; *McCrae v. Osborne*, 6 O. S. 500; *Heward v. McDougall*, 3 O. S. 647. There is also a preliminary objection. The defendant's name is “Joseph Aloysius Donovan.” The writ of summons was taken out and served in that name, and the declaration names the defendant in like manner; while the affidavits on which this rule was obtained and the rule style the defendant as “Joseph A. Donovan;” and on a motion of this kind that is a fatal objection:

*Beauchamp v. Cass*, 1 P. R. 291; *Davidson v. Grange*, 5 P. R. 258; *King, q. t. v. Cole*, 6 T. R. 640; *Poole v. Pembrey*, 1 Dowl. 693; *Stevenson v. Hodder*, 15 Grant 542.

*H. J. Scott* supported the rule. It does not appear by affidavit that the style of the cause is as the defendant has stated it. The affidavits and rule are rightly intituled. This application is made under the Administration of Justice Act, 1873, sec. 30, which enacts that "any party or person refusing or neglecting to attend at the time and place appointed for his examination, or refusing to be sworn, or to answer any lawful question put to him by the examiner, or by any party entitled so to do, or his counsel, attorney, or agent, shall be deemed guilty of a contempt of Court, and proceedings may be forthwith had by attachment. Provided, always, that if the party under examination shall demur or object to any question or questions which may be put to him, the question or questions so put, and the demurrer or objection of the witness thereto, shall be taken down by the examiner and transmitted by him to the office of the Court to be there filed, and the validity of such demurrer or objection shall be decided by the Court or a Judge; and the costs of and occasioned by such demurrer or objection shall be in the discretion of the Court or Judge." It is plain the defendant has not obeyed the order. He has rendered the examination a nullity. He could have answered the questions without the production of the pleas, and he should have done so. The defendant assumes to have acted under the belief that he was not obliged to answer without the production of the pleas.

October 9, 1877. WILSON, J.—As to the preliminary objection, the defendant does appear by the writ of summons and declaration to be described as "Joseph Aloysius Donovan," and in the affidavits for the rule granted on this motion and in the rule he is described as "Joseph A. Donovan." It appears also among the papers filed that in the order for his examination, and in the appointment founded upon it made by the examiner, that the defendant is described in the intituling of these proceedings "Joseph

A. Donovan," and it is admitted he attended upon them. The depositions returned are also intituled in the like way.

It is irregular to describe a defendant by his full Christian name of William when he was sued by the initial of "W."

Williams, J., said, "I am satisfied that it is not an affidavit so intituled as that perjury could be assigned upon it": *Regina v. Sheriff of Surrey*, 8 Dowl. 510; *Sims v. Prosser*, 15 M. & W. 151.

In *Hodgson v. May*, 18 L. J. Q. B. 249, the defendant was sued by initials of his Christian name. He described himself in the intituling of an affidavit in the course of the cause by his full name, adding thereafter, "sued by the name of B. W. May." These additional words were held to be no objection, as by such words "the title was connected with the previous proceedings in the action."

And in *Beauchamp v. Cass*, 1 P. R. 291, it was held that where the defendant was sued by the name of "Davis Cass," and was so described in all the later proceedings, it was irregular to describe him in an affidavit used to prevent the plaintiff from recovering costs, because he had recovered much less than he had held the defendant to bail for, by the name of "Davis H. Cass," or by his full name of "Davis Hawley Cass."

I should have been obliged to have given effect to this objection if it had not appeared that in the order for examination of the defendant, and in the appointment made thereunder, the defendant has been described in the same way as in the affidavits and rule objected to, by the initial of Joseph A. Donovan, instead of giving the second name in full. It cannot then, I think, be said that it appears the affidavits and rule are not in the cause against "Joseph Aloysius Donovan," when among the papers in that cause are filed certain proceedings admitted to be against the same defendant, and on which he appeared and was examined under oath by the name and description of Joseph A. Donovan.

I do not think the defendant can object to the alleged irregularity after his acquiescence in the proceedings referred

to. The very first answer the defendant made on his examination, headed in the cause of *John O'Donohoe v. Joseph A. Donovan*, was, "I am the defendant in this cause." I must therefore decide the preliminary objection against the defendant.

As to the merits.

The defendant, as I understand his answers, says that he was contending before the examiner that he was not bound to state what the contents of the writing containing his pleas were, and that the pleas themselves were the best evidence of that fact; while the plaintiff was insisting that the defendant was bound to answer these questions without the production of the pleas. The defendant in effect said, My pleas are contained in a paper filed in this cause, and I decline, without the production of that paper, to say what they are.

The defendant might certainly be asked, "Do you know what this action is brought for? Have you appeared to the action? Have you pleaded to the declaration? Do you know what pleas you have pleaded?" For in none of these cases is the party asked to speak of the contents of any writing.

The question, "What are your pleas in this action?" is one which does enquire what the contents of a written instrument are, for the pleas are required to be in writing and to be filed.

In *Henman v. Lester*, 12 C. B. N. S. 776, in which the defendant was asked on cross-examination whether there had not been proceedings in an action against him in the County Court in respect of a similar claim, which he had resisted, and upon which he had given evidence, and the jury, notwithstanding, had found their verdict against him, it was held the question was allowable without producing the proceedings from the County Court.

I am of opinion a party may always be asked in the same cause in which he is examined what it is he is suing for, if he is a plaintiff, or what his defence is, if he is a defendant.



There was no room here for supposing that the plaintiff was holding back better evidence by not producing the pleas.

If the defendant had been asked whether he defended the action or not, and on what ground he defended it, I think he would have been bound to answer these questions. If he had been asked if he denied the publication of the libel, or alleged libel, complained of, he would have been bound to answer that question.

What are your pleas in this action? is very like the enquiry on what ground he defended the action. If he was obliged to answer that question, he certainly was obliged to answer the others.

Why he was asked these questions is not very plain. The original pleas filed need not certainly have been produced to the defendant. At most, a copy would have answered, and the copy served on the plaintiff by the defendant would have been sufficient if production should have been made at all.

I am of opinion the pleadings should have been before the examiner, otherwise he could not know what it was he was to examine upon, or whether the questions asked related to the matter in controversy or not, or whether he had jurisdiction or not.

If the pleadings or issue had been there, they would have been assumed to be the pleadings in the cause. I do not mean the original pleadings, but copies duly verified.

I am not entirely satisfied the defendant was bound to answer the question put to him, "What pleas he had pleaded to the action?" And I do not know why it should have been necessary to have asked that question; for if the pleadings had been before the examiner, as I think they should have been, the question would have been unnecessary.

At the trial, while the record was before the Court, it would be quite useless to ask the defendant such a question for the purpose of asking him afterwards whether the plea was true or not. The record would shew what the pleas were, and it could not be controverted.

I do not consider the defendant was guilty of any contempt. He was determined to keep the plaintiff to the observance of the strict rules of evidence; and the plaintiff, I suppose, was as determined not to produce the pleas filed—which he was not obliged to do—nor any pleas, merely to satisfy, as he supposed, an unwarrantable requirement of the defendant.

From the nature of the action, it is not likely the parties are on very good terms, and the examination, I think, shews that to be so.

I can make no order as to the alleged contempt.

As to the residue of the rule, I shall order the defendant to appear for examination again upon the order heretofore made for that purpose, at such time and place as the examiner shall appoint, and that he do so appear at his own cost. He had no right to require the pleas which were filed to be produced to him; and I do not give him any additional allowance as a witness.

For that reason, also, I do not give him the costs of this application; and I cannot give them to the plaintiff, because he should have had the pleadings in the suit before the examiner, in which case the examination he was pursuing would not have been necessary.

The rule will be discharged on the terms before stated.

*Rule discharged.*

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## CASPAR V. KEACHIE ET AL.

*Judgment—Revivor—Limitation—38 Vic. c. 16, sec. 11.*

A writ of revivor or suggestion entered upon the roll is a "proceeding," and a judgment is to be considered as "charged upon or payable out of land" within the 38 Vic. ch. 16, sec. 11, O., so that it cannot be revived by writ or suggestion after ten years.

In this case the defendant did not set up the limitation upon the hearing of the rule to revive, and relief was on this ground refused to him.

On the 10th of May, 1877, Mr. Dalton, C. C. and P., made an order in Chambers to enter a suggestion on the Roll to revive a judgment recovered by the plaintiff against the defendants more than fifteen years before, the defendant not shewing cause.

On the 6th of July, G. B. Gordon obtained a summons to set aside the order of the 10th of May, which summons coming on to be heard by Hagarty, C. J. C. P., was referred to the Court, as he did not think, sitting as a Judge in Chambers, he could try the matters in dispute.

August 24, 1877. *G. B. Gordon* obtained a rule calling on the plaintiff to shew cause why all proceedings on the judgment herein should not be stayed, and why satisfaction should not be entered on the roll, or why an order made in Chambers on the 10th of May, 1877, should not be rescinded, and why the plaintiff should not pay the costs of this application, and of an application in Chambers under summons dated the 6th of July last; or why such other rule should not be made as might be necessary.

The rule was argued by *Nugent* for the plaintiff, and *G. B. Gordon* for the defendants, on the 14th and 21st of September. After several enlargements had been granted to the defendants, and on the last day Wilson, J., discharged the rule upon the merits. He suggested that as the judgment revived was fifteen years old, it might be the 38 Vic. ch. 16, sec. 11, D., was a bar to the order of revivor being made after the lapse of ten years, and he ordered the case to stand over to be argued upon that point.

October 5, 1877. *Nugent*, for the plaintiff. A writ of revivor is not "an action, suit, or other proceeding" within the meaning of that section of the Act; and this judgment was not for a sum of money "charged upon or payable out of any land or rent," under that section. He referred to *Farrell v. Gleeson*, 11 Cl. & F. 702, 709; *Farran v. Beresford*, 10 Cl. & F. 319; *Wall v. Walsh*, L. R. 4 Ir. C. L. R. 103; *Johnson v. Bell*, 6 Ir. C. L. R. 526.

*G. B. Gordon*, contra. By the 24 Vic. ch. 41, the registration of judgments was abolished in this Province. But it is as much a charge upon the lands now as it was when 4 Wm. IV. ch. 1, now Consol. Stat. U. C. ch. 88, sec. 24, was passed. That Act was taken from the Imperial Statute, 3 & 4 Wm. IV., ch. 27, sec. 40, under which latter Act *Watson v. Birch*, 15 Sim. 523; *O'Kelly v. Bodkin*, 2 Ir. Eq. R. 373; *Henry v. Smith*, 2 Dr. & War. 381, and *Bennington v. Evans*, 1 Y. & C. Ex. 434, were decided; and according to these cases, the land being liable to be sold for the satisfaction of the judgment, makes it a charge upon and payable out of lands, within the language of the statute: 3 *Chitty's Statutes*, 2nd ed., 56, and notes.

October 9, 1877. WILSON, J.—The legislation on the subject is as follows:—The 38 Vic. ch. 16, sec. 11, O., enacts that "No action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of, any land or rent, at law or in equity, or any legacy, but within ten years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable or his agent, to the person entitled thereto or his agent," &c.

That is precisely the same as Consol. Stat. U. C. ch. 88, sec. 24, excepting that twenty years in it is altered by the later Act to ten years.



The Imperial Act, 3 & 4 Wm. IV., ch. 27, sec. 40, was the one from which our Act 4 Wm. IV., ch. 1, sec. 43, contained in the Consol. Stat. U. C. ch. 88, sec. 24, was taken, and it is worded in similar language to our Act.

The Imperial Act, 37 & 38 Vic. ch. 57, sec. 8, substitutes twelve years for the twenty years in the earlier statute.

I have examined the cases cited, and I am of opinion that a writ of revivor or suggestion entered upon the roll is a *proceeding* within the meaning of the statute, and that a judgment, under the section of the Act in question, is to be considered as "charged upon or payable out of land," as in effect it is when the land of the debtor can be seized and sold under it; and that it cannot be revived by writ or suggestion, if the debtor oppose the rule to shew cause, or, if the proceeding be by writ of revivor, if the defendants appear to the writ and plead the defence of the limitation of ten years.

Here the defendant did not shew cause to the rule, and from the facts appearing before me he did not intend to do so.

The suggestion was entered on the roll, and not until the defendants' goods were seized under an execution did he pay any attention to the matter.

He could not plead to the suggestion, because it was made by direction of the Judge, inasmuch as it manifestly appeared to him that the plaintiff was entitled to have execution of the judgment.

Now he applies to be relieved from the rule and suggestion, upon grounds which he should, so far as the merits are concerned, have advanced upon the hearing of the rule, and he now also claims that the judgment was barred by the statute before referred to.

He comes late with that defence, and as I have decided against him on the merits, I do not think I should interfere in his favour now.

Under the circumstances I shall discharge the rule, without costs.

*Rule discharged.*

## COLLINS V. MARTIN.

*Infant—Guardian—Power to lease land.*

In replevin defendant avowed for rent, alleging that the plaintiff held the premises as tenant thereof to one L. as guardian of M., under a demise at a yearly rent of \$350: that L. after making the lease, and about the 2nd of April, 1877, died intestate, without appointing any guardian to M.; and defendant was, on the 21st May, 1877, appointed by the Surrogate Court guardian of M. in place of L.; and because \$272 of the rent was due from plaintiff to defendant as such guardian, defendant took the goods as a distress therefor.

*Held*, on demurrer, that the plaintiff must succeed; for in this Province a guardian, having no estate in the land as in England, cannot lease his ward's land in his own name; and if he could his lease would determine on his death or on the ward attaining full age: that if the demise was by deed the personal representative of L. only could sue for the rent; and if not by deed the defendant might recover the rent in the name of the infant, but could not avow for it in his own right as guardian.

REPLEVIN. Avowry for rent, that the plaintiff during all the time for which the rent distrained for accrued due, and until the alleged taking of the said goods, held the premises in question from one Margaret Locksey, as guardian of James Albert Martin, as tenant thereof to the said Margaret Locksey as such guardian, under a demise thereof at the yearly rent of \$350, payable \$150 on the 1st of June, \$100 on the 1st of August, and \$100 on the 1st of October, in each and every year during the term: that Margaret Locksey, after the making of the lease, and on or about the 2nd of April, 1877, died intestate, without appointing any guardian to James Albert Martin; and upon the petition of the defendant to the Surrogate Court of the county of Perth he was, on or about the 21st of May, 1877, appointed guardian of the said infant in the place of Margaret Locksey, deceased; and because \$272.72 of the rent, at the time of the alleged taking, was due and in arrear from the plaintiff to the defendant as such guardian, the defendant as such guardian well avows the taking of the said goods as a distress for the said rent.

Demurrer to avowry.

October 26, 1877. *Bain* for the demurrer. The action was begun on the 7th July, 1877, and the defendant was

appointed guardian on the 21st of May before that. The day of the taking is not stated. It must have been before the 7th of July. It may perhaps be inferred that the distress was made for the June rent, which would be \$150, and which fell due while the defendant was guardian. But the difference between that sum and the \$272.72, for which the distress was made, or \$122.72, must be for rent which fell due in the lifetime of Margaret Locksey. The plaintiff contends that the defendant as guardian was not authorized in law to distrain for either part of the \$272.72. The administrator of Margaret Locksey may be entitled to sue for the rent which fell due in her lifetime; and the defendant cannot claim the \$150 rent which fell due after her death if the demise still continued, because he does not as guardian take the place of Margaret Locksey as lessor. The legal estate in the land remains all the time in the infant. The estate of the guardian is gone upon his death: *Woodfall*, L. & T., 10th ed., 40, 387; *Kerr* on Receivers, 139; *Hughes v. Hughes*, 1 Ves. 161; *Evans v. Mathias*, 7 E. & B. 590, 602.

*Spencer*, contra. The only pleading relied upon is the avowry which has been made. The estate and interest in the land were and are in the infant. The guardian has the mere management of the estate. When Margaret Locksey died, the lease was not determined, nor was the rent which had then accrued lost to the infant. The new guardian, the present defendant, became entitled on his appointment to enforce all the rights of the ward, and among them the payment of the rent due in the time of the previous guardian, and also all future rents so long as the demise continue. The receiver has power to distrain: *Woodfall*, L. & T., 10th ed., 394. The mortgagor may distrain on a lease he had made before mortgage, for rent accruing due after the mortgage, in the name of the mortgagee as his agent: *Trent v. Hunt*, 9 Ex. 14. He referred also to *Lambert v. Marsh*, 2 U. C. R. 39.

October 30, 1877. WILSON, J.—It was admitted on the

argument that there was no authority in such a case as the present. I have not found any. I shall refer to the authorities which have a bearing on the subject, and draw from them the best deductions I can.

In *Osborn v. Carden*, Plowd. 293, 293*a*, 293*b*, it is said : "So that the whole estate and interest of the guardian is to the use of the infant, and no part of it is to the use of the guardian. And therefore if the guardian in socage dies, his executors shall not have the wardship of the body nor of the lands of the infant, for they shall have nothing but what the testator had to his own use \* \* but the next ancestor to the infant, who has the like natural affection for him."

In that case Thomas Ford was seized of the land and died, leaving Walter, his son and heir, aged five and a half years. The plaintiff, as his mother, after her husband's death, as his guardian in socage, seized the body of the infant and entered into the tenements, and was thereof possessed. And being so possessed she married Thomas Osborne, whereby she and her husband became possessed ; and being so possessed they demised the land by indenture for eight years to Carden, one of the defendants, who demised to Joy, the other defendant, for four years. The plaintiff's husband died before the ward was fourteen. The widow, as guardian in socage, entered before the determination of the lease upon the tenants, who dispossessed her, whereupon she brought trespass against them.

The Court held she was entitled to recover, because the lease did not bind her longer than the coverture, and it was voidable by her at his death, because the land demised was held in the right and for the interest of the infant, and for his benefit the lease should be avoided. "For this in effect is the act of the infant by the guardian"; and the direction and management of the land cannot be divested out of the wife by the act of another.

The guardianship remains in the mother of the infant notwithstanding her subsequent marriage, for it is annexed inseparably to the person of the mother : *Ratcliff's Case*, 3 Co. 37*a*, 39*a*.



This guardianship being a personal trust, and merely for the benefit of the heir, cannot be assigned or devised, nor is it transmissible to executors; but on the guardian's decease it devolves upon the person who is next of kin to the infant, not being inheritable to him: *Co. Litt.* 90a, note 1, sec. 125, "because the guardian in socage has not the wardship to his own use, but to the use of the heir."

A guardian in socage has not only a bare authority but an interest in the land descended, and may therefore hold Courts and grant copyholds in his own name; and he may make a lease for years, and it is good; and the lessee may have an ejectment: *Shoplund v. Ryoler*, Cro. Jac. 55, 98.

In *Bedell v. Constable*, Vaughan 177, 178, it is said the land follows the custody and not the custody the land; and the land must go as the custody can go, and not the custody as the land can go. At p. 181, the guardian in socage cannot assign, nor shall the custody go to his executors, for he has no interest for himself and the trust is personal. At p. 182, the guardian has an interest. He may let the ward's lands during minority, avow in his own name, grant copyhold estates, and the like. At p. 183, the custody by the guardian determines with his death, for that is a condition in law.

It was doubted whether the lease of a guardian for twenty-one years was void or voidable when the heir came of age: *Roe d. Parry v. Hodgson*, 2 Wils. 129.

In *Smith's L. & T.*, 2nd ed., 62, it is said it is voidable only, and may be confirmed by the infant when of full age.

A lease by a tenant for life determines by his death, and cannot be confirmed by the remainder-man. But if the latter accept rent, it may be evidence of a new tenancy: *Doe d. Martin v. Watts*, 7 T. R. 83.

When a lease by deed has been made by the guardian in his own name, although the lessee covenant to pay the rent to the infant, he cannot be joined with the guardian in an action for the rent: *Lord Southampton v. Brown*, 6 B. & C. 718.

In *Carnegie v. Waugh*, 2 D. & R. 277, the tutors dative

appointed by a Scotch Court as guardians of an infant, executed for and on his behalf a tack or agreement *inter partes* for a lease, whereby a salmon fishery in Scotland was demised to the defendant for four years at a certain rent agreed to be paid to the infant. The infant brought an action of debt for rent in his own name. It was objected that it was not shewn the infant was of full age, so as to bring the suit; and that whether he was of full age or not he could not sue on the agreement, as he was no party to it. It was ruled that it would be assumed he was of full age unless the contrary was shewn; and that although he was not expressly a party to the agreement, yet as it was made in his name and for his benefit, and as the payments were to be made to him, he was not disqualified by any rule of law from maintaining the action. Afterwards in term a rule was refused. It was said by the Court that the last objection applied to deeds, properly so called, and this was not a contract under seal by the law of England.

*Fitzmaurice v. Waugh*, 3 D. & R. 273, was like the previous case, excepting that in this case the rent was not payable to the infant, but to the tutors dative. The result was the same. The person for whom the lease was made was held entitled to sue on it in his own name: *Higgins v. Senior*, 8 M. & W. 834; *Fisher v. Marsh*, 11 Jur. N. S. 795.

One who attorns to a receiver in Chancery becomes a tenant by estoppel to the receiver. He does not thereby become tenant to the person having the legal estate: *Evans Mathias*, 7 E. & B. 590.

Our own statute law, Consol. Stat. U. C. ch. 74, authorizes the Surrogate Court for the county in which the infant resides to grant letters of guardianship to some suitable and discreet person, who shall, during the continuance of his guardianship, have authority to act for and in behalf of the ward. And he may appear in any Court and prosecute or defend any action in the infant's name; and he shall have the charge and management of his or her estate, real and personal, and the care of his or her person and

education. And if the infant is under fourteen years of age, he may, with the consent of two Justices of the Peace, and the consent of the ward, or if the infant is above fourteen years of age, he may, with the consent of the ward, bind the ward to any lawful trade, profession, or employment, not exceeding, in the case of males, the age of twenty-one, and in the case of females, the age of eighteen, or marriage within that age.

The guardian, his executors or administrators, is and are bound to account for the estate when the ward attains twenty-one, or whenever the guardianship is determined, or sooner if required thereto by the Surrogate Court.

In England the guardian in socage or the testamentary guardian, under the statute of Charles II., acts in his own name for all he does for the infant, and has and takes an interest and estate in his realty, so as to be able to demise it, and to maintain ejectment and trespass in his own name, and to distrain for rent, and the like.

In this Province he has the charge and management only of the estate of the infant and the care of his person and education; and he is required to prosecute and defend actions in the infant's name; and if he binds the infant to any lawful trade, profession, or employment, he can do so only with the consent of the infant, if he is above fourteen years of age, and with his consent and that of two Justices of the Peace if he is under that age.

I am of opinion that under such letters of guardianship the guardian has not the rights, power, and estate in the ward's property, real and personal, which the guardian in socage or the testamentary guardian in England has—that he is here more in the nature of an agent, bailiff, or receiver, as respects the ward's estate; and that he has not the right or power legally to demise in his own name the ward's lands, because the legal estate, right and title to all such property are vested in the infant, and are not by the letters of guardianship transferred to the guardian during his tenure of office.

Assuming that the guardian here could demise in his

own name, I do not know how his demise can last for a longer time than his estate or interest endures. On the ward attaining full age the guardianship ends. Upon the death of the guardian his estate is determined.

A lease made for a longer time than the guardianship continues is certainly voidable. But is it not void ?

A lease for a long term of years, made by the tenant for life, may happen to last as long as the estate—for life. But a lease for twenty-two years, or for any time beyond the majority of the infant, cannot determine within the period of the guardian's power or office.

If the lease of a tenant for life becomes void upon his death, and cannot be confirmed by the remainder-man, what is there to maintain the lease of the guardian after his office is closed ?

It may be said that the guardian professes to act and to contract for and on behalf of the ward, while the tenant for life professes to act and does act for himself alone.

I think that can make no difference, because the guardian, although he acts for the ward, can do so only so long as he is the guardian.

In the case of a deed to which the infant is no party, made by the guardian, the infant cannot on attaining majority give it any confirmation, and sue upon it.

In the case of a demise, not by deed, made by the guardian, the infant can sue upon it in his own name, although he is not a party to it by name, upon the ground that he is the owner of the property, and in effect the principal in the transaction, because it was made for him and in his interest by one who represented him.

In the case of a demise by deed, made by the guardian, the rent which fell due while the guardianship lasted could be sued for by the guardian after the determination of his guardianship, if he be alive; or if he be dead, it could be sued for under the deed by his personal representative.

In the case of a demise not by deed, the infant on coming of age can adopt it or not as he pleases: that is, it is voidable only, and he would bring the action in his own name if he affirmed it.



If the guardian die before the wardship has determined, and if the demise be not by deed, the infant can bring the action for the rent in his own name, because he is, as before said, a party to it, although not named in it.

I have been assuming so far that the guardian can demise in his own name in this Province. But he cannot do so rightfully. He should do it in the infant's name.

Here, however, Margaret Locksey did demise in her own name to the plaintiff, whether by deed or not does not appear.

If it was by deed, I am of opinion that the personal representative of Margaret Locksey alone can sue upon it for the rent which accrued in her lifetime; and that on her death the demise became absolutely void; and that an action for use and occupation can be maintained by the present guardian for what may be called the rent which has fallen due since the death of Margaret Locksey.

If it were not by deed, and it is not alleged to have been, I am of opinion that on the death of Margaret Locksey the term did not necessarily expire; the demise was capable of being affirmed and adopted as a contract, to which the infant was and is a party, although not expressly described as a party, to it; and that the present guardian in the infant's name and on his behalf became, upon his appointment of guardian, authorized to recover the rent which accrued as well in Margaret Locksey's lifetime as since her death, by distress or suit, in the infant's name as his guardian.

But he cannot avow for it in his own right as guardian in this Province, because he has not any estate or interest in his own person in the land or rent or demise. He has only the care and management of the property, and he is bound to act in the infant's name in everything he does as if he were an agent or bailiff of his ward.

In England, I should be disposed to think the defendant could in his own name as guardian distrain for the rent which fell due in the former guardian's time as well as that which has fallen due in his own time, and avow

for the same, as he has done here, upon the assumption that this is a parol lease and not a lease by deed from Margaret Locksey. But that, of course, I have nothing to do with.

The result is, that on this avowry the plaintiff must succeed. But the defendant should be allowed to amend, setting up a cognizance as bailiff or guardian of the infant.

I should add, that if the demise were by the deed of the guardian, the defence cannot be sustained under the deed in any form. But if the tenant paid rent or attorned to the defendant as guardian, that would be evidence of a new demise.

On these pleadings there will be judgment on demurrer to both avowries for the plaintiff.

*Judgment accordingly.*

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### MASON, ASSIGNEE OF McCARTY, v. HATTON ET AL.

*Sale of goods—Delivery and acceptance—Lien.*

The defendants having a stock of lumber at Milton agreed verbally to sell it to M., to be delivered at Bronte station on the Great Western Railway, for \$12 per 1000 feet, and to be paid for as shipped from the station by him, which he was to do as fast as defendants hauled it there. M. paid on the making of the agreement \$1000 on account of the purchase money. At first M. shipped it away as fast as it was delivered at the station, and afterwards not so rapidly, but with defendants' knowledge, and without objection, he culled, measured, and piled it, marked it with his initials, and left it in charge of the station master, who on his directions from time to time shipped large quantities of it. About six weeks before M. became insolvent, one of the defendants requested payment from him for the lumber then lying at the station, when M. put him off and said, "You are all right any way. You have the lumber there at Bronte Station."

*Held*, that there had been a delivery to and an acceptance and receipt by M. of the lumber, so that defendants had lost their lien, which could not be re-established by M.'s statement to defendant. M.'s assignee was held entitled therefore as against the defendants.

SPECIAL CASE stated without pleadings.

McCarty, prior to the year 1873, during the whole of that year, and up to the 23rd of March, 1874, resided at the city of Hamil-

ton, in the county of Wentworth, and there carried on the business of a lumber merchant.

The defendants during the same period owned a saw mill near the town of Milton in the county of Halton, and had there a stock of lumber known as the stock cut in 1873.

The defendants and McCarty entered into an agreement with each other, which was merely verbal, and by which it was agreed that the defendants should sell to and McCarty should buy the whole of the defendants' said stock cut in 1873, to be delivered by the defendants to McCarty at Brontè station, on the line of the Great Western Railway, between Hamilton and Toronto, for the price of \$12 per thousand feet, and to be paid for as McCarty shipped it from Brontè station; and McCarty was to ship the lumber as fast as defendants hauled it to said station; and at the time of making the agreement McCarty paid in advance \$1000 on account of the purchase money therefor.

In pursuance of this agreement the defendants hauled all their stock of lumber known as the stock cut in 1873 to and deposited it upon the Great Western Railway Company's land at that station, and the defendants had then nothing further to do to complete their part of the contract; and it was so hauled and deposited there, not all at one time, but from time to time as defendants' teamsters could haul it to said Brontè station with teams from their said saw mills; and according as it so arrived and was unloaded from the trains at Brontè station by defendants' teamsters, McCarty at first, as defendants' teamsters unloaded and deposited it on the said Great Western Railway Company's grounds had his, McCarty's men measure it and immediately put it on the cars; but, afterwards, during the fall of 1873, and more than sixty days previous to the issue of the writ of attachment hereinafter referred to the residue of the lumber of the stock cut in 1873, was hauled out to and deposited by the defendants' teamsters upon the railway grounds at Brontè station, and left there. After the lumber was so left from time to time, it was, in the absence but with the knowledge of defendants, and without objection, culled, measured and piled upon the railway lands by McCarty's workmen, and the piles were marked with McCarty's initials, J. C., in pencil, by McCarty's foreman, and McCarty having no immediate orders on hand from customers for the unshipped portion of the lumber he, for his own convenience, did not ship such unshipped portion of the lumber as hauled, but left such unshipped portion of it where it was so piled and marked as aforesaid upon the railway lands at Brontè station in charge of the station-master, to be shipped by him from time to time as McCarty should direct, to his place of business in Hamilton aforesaid or elsewhere, but defendants were no parties to and had no notice or knowledge of that arrangement between McCarty

and the station master. It was owing to this arrangement between McCarty and the station-master, and to enable him more conveniently to ship as McCarty should direct him that the piles were, as was the fact numbered by McCarty, and the shipments of a large portion thereof were afterwards made in reference to such numbers by the station-master, on instructions received by him from McCarty from time to time as he, McCarty, required it.

Such shipments were made in the absence of and without objection by defendants, who knew McCarty was so shipping some of the lumber, he having, as hereinafter mentioned, given his promissory notes in payment of the price thereof, but not as much as he actually did, he having shipped a considerable amount beyond what he so gave his notes for ; and McCarty, besides the \$1,000 paid in advance by him upon such lumber as aforesaid, also paid defendants for a considerable amount more of such lumber by discounting accommodation paper of defendants to which McCarty was a party also, he not having any bank account of his own, and handing defendants the proceeds thereof, and all of this accommodation paper was afterwards paid by McCarty, except about \$2,000 thereof which is included together with the price of the residue so shipped and unpaid for by McCarty in defendants' claim filed against the insolvent estate of McCarty. The residue of the lumber of 1873 was never shipped nor any amount paid for or upon it either in the above or in any other manner, but the whole thereof was always left on the Great Western Railway Company's grounds, where it had been deposited, measured, and piled, and marked as aforesaid in the manner and under the circumstances aforesaid, until after McCarty became an insolvent, and after the plaintiff was made an assignee of his estate and until it was received and sold by the defendants under the agreement in that behalf made between them and the plaintiff as hereinafter mentioned, and what was so removed and sold by the defendants' or rather the net produce of the sales thereof by the defendants, is all that is in dispute herein between the plaintiffs and the defendants.

It is further admitted by the plaintiffs and defendants that about six weeks previous to the issuing of the writ of attachment hereinafter referred to, the defendant Hatton called at McCarty's office in Hamilton, and requested payment from McCarty of the price of the unshipped and unpaid lumber at Brontè station, when the following conversation took place between them in reference thereto: McCarty said he could not pay for it just then, nor until the middle of the next month. When defendant Hatton, asked McCarty if every thing was all right with him financially. McCarty answered, Yes, and added, " You're all right, any way, you have the lumber there at Brontè station." Nothing more was said or done at that time, nor until as hereinafter mentioned.



McCarty was a trader within the Insolvent Acts of 1869 and of 1875, and on or about the 23rd of March, 1874, a writ and concurrent writs of attachment in insolvency were duly issued out of the County Court of the county of Wentworth against the estate and effects of McCarty, pursuant to the provisions of the Insolvent Act of 1869, and the same are still valid, and in full force, and the plaintiff has been duly appointed under and by virtue of the provisions, and still is the assignee of the insolvent estate of McCarty under and by virtue of the statutes.

When the plaintiff was appointed such assignee in insolvency, the defendants notified the plaintiff that they claimed all such unshipped and unpaid for lumber then remaining upon the railway lands at Brontè station, under the circumstances aforesaid.

And it was thereupon agreed between the plaintiff and the defendants that without prejudice to any of the rights of the plaintiff or the defendants concerning the premises, the defendants should sell the lumber so then remaining on the railway lands at Brontè station, and that the amount realized from such sales should for all purposes of this suit represent the lumber so to be sold by the defendants; and if it should be held by this Court that the plaintiff as such assignee, was, and is, under the circumstances above mentioned, entitled to the lumber as against the defendants without paying them the purchase money therefor (it not being disputed by the plaintiff that the defendants have the right if they see fit to rank on the insolvent estate in respect thereof), and that the defendants had and have under the circumstances no unpaid vendor's lien or other lien or charge in that behalf, that then the defendants should account to the plaintiff for and pay over to him the net produce of such sales thereof less expenses.

If the plaintiff is entitled to recover against the defendants concerning the premises, it is admitted that he is entitled to recover the sum of \$700.35 being such net proceeds of sales together with whatever further amount the interest thereon from the 1st of July, 1874, until the day of delivery of the judgment of the Court herein will amount to.

The above are the full facts and circumstances, and the Court may and are hereby empowered to make all proper inferences and draw all proper conclusions from all above set forth, treating it as evidence and the whole evidence in this suit.

The Court is to enter such verdict for the plaintiff or the defendants as, under the circumstances above mentioned, ought in the opinion of this honourable Court to be entered, and the costs of this suit are to abide the event.

September 12, 1877. *Duff*, for the plaintiff. The property became that of McCarty, the insolvent, by its delivery

to him at the Brontè station. The defendants allowed him to measure and cut the lumber, and to mark it with his initials: *Wiley et al. v. Smith*, 1 App. 179; *Cooper v. Bill*, 3 H. & C. 722; *Benjamin* on Sales, 2nd ed., 686.

*R. Martin*, Q. C., contra. The sale was for cash, not a credit sale. There is a lien for payment unless it is waived, and defendants did not waive it. The payment was to be made upon delivery, for the lumber was to be shipped immediately upon delivery. If the lumber had been placed upon the defendants' own land there would clearly have been a lien still upon the lumber; and the fact that it was delivered at a railway station does not alter the defendants' rights, because the delivery was not upon the insolvent's land, and so it was not put into his own possession. McCarty's admission also before his insolvency, when the defendants asked him if he was all right in his financial circumstances, that the defendants were all right anyway, for they had the lumber that was at Brontè station, shewed what the agreement and understanding of both parties was, and that was that the defendants had and should have a lien upon all the lumber at the station for the unpaid part of its price: *Benjamin* on Sales, 2nd ed., 666, 667; *James v. Griffin*, 1 M. & W. 20; *Salte v. Field*, 5 T. R. 211, 214; *Gunn v. Bolckow*, L. R. 10 Ch. 491; *Bolton v. Lancashire and Yorkshire R. W. Co.*, L. R. 1 C. P. 431, 437; *Ogg v. Shuter*, L. R. 1 C. P. D. 47; *Mason v. Redpath*, 39 U. C. R. 157, 166, 167.

October 16, 1877. WILSON, J.—The lumber, by the agreement, was to be delivered by the defendants to McCarty at Brontè station for \$12 per 1,000, to be paid for as McCarty shipped it from Brontè station, and he was to ship it as fast as the defendants hauled it to the station.

When it was hauled to the station it was under the agreement considered as delivered to McCarty, who was to pay for it as soon as it was shipped, and it was to be shipped as fast as it was hauled. McCarty paid at the time of the verbal agreement \$1,000 on account of the purchase money therefor.

McCarty at first put the lumber on the cars as soon as it was delivered at the station ; after that McCarty did not send it off so rapidly, but with the defendants' knowledge, and without objection by them, he culled, measured, and piled the lumber, and marked it with his initials, and he left the lumber in charge of the station master. The piles were numbered, and he directed the station master from time to time to ship, as it is called, large quantities of the lumber from time to time, all but the quantity now in question, and it was sent accordingly.

I think it cannot be doubted that these facts shew a delivery by the defendants of the lumber to McCarty, and an acceptance and receipt of it by him. The defendants gave up their possession of the lumber to McCarty, and he took it into his possession: *Cooper v. Bill*, 3 H. & C. 722. An action for goods sold and delivered would have lain against him at the suit of the defendants. The possession by the railway company after that was as mere custodians of the lumber: *Smith v. Hudson*, 6 B. & S. 431; *Gunn v. Bolckow*, L. R. 10 Ch. 491, 501.

When the defendants parted with the possession of the lumber, they parted with their lien: *Baldehy v. Parker*, 2 B. & C. 37, 44; *Cusack v. Robinson*, 1 B. & S. 299, 308.

It is true, the lumber, although to be delivered to McCarty at the station, was to be paid for when it was shipped, and it was to be shipped as fast as the defendants hauled it to the station. And Mr. Martin contended that the effect of that arrangement was that McCarty was to pay for the lumber upon its delivery to him, and that, until he paid for it he was not to get it.

I do not think that the agreement is to be so construed. McCarty was to have a delivery of the lumber at the station. He was to ship it, and then he was to pay for it. It may be that all these acts might at times have been done almost simultaneously if cars for the purpose of loading the lumber were there ready at the time it was hauled to the station. But by that time the property had passed completely into the possession of McCarty. He could have

consigned it to whomsoever he pleased, and so have passed the property in it over to such consignee, and the defendant's had lost their vendor's lien.

But suppose no cars had been at the station when the defendants hauled the lumber there and delivered it to McCarty, and he could not for that cause have shipped it for days after it was delivered, who would have had the possession of it in the meantime?

In my opinion McCarty, because the lumber was to be delivered to him at the station, and he was not to pay for it on delivery, but upon his shipping it, and it must have been necessarily understood between them as a part of the contract that he was not to pay for the lumber so long as he could not procure the cars to enable him to send it away.

The cases which were cited respecting the right of stoppage *in transitu* have no bearing here, for the lumber was in possession either of the defendants or of McCarty. If in the defendants' possession there was no *transitus*, if in McCarty's possession the *transitus* was at an end.

If goods can be stopped *in transitu* by reason of the insolvency of the vendee, they can *a fortiori* be stopped by the vendor before they have ever left his possession, but that is by reason of his lien for the unpaid price: *Bloxam v. Sanders*, 4 B. & C. 941, 949.

In this case the lumber was not sold to McCarty while it was lying at the station. It was hauled there for him, and delivered there to him: *Bolton v. Lancashire and Yorkshire R. W. Co.*, L. R. 1 C. P. 431, 438.

I do not think that the statement made by McCarty to the defendants, who were pressing him for payment, and were desirous of ascertaining if he was in solvent circumstances, "you are right anyway, you have the lumber there at Brontè station," and nothing done upon it, conferred any new right upon the defendants.

It was used as evidence by Mr. Martin that the plaintiffs had never lost their original lien; but it does not appear to me that on the facts of the case which shew that the



lien was completely parted with and abandoned, it can be resuscitated and established, as if it had never been given up, by such a conversation as the one relied upon.

I find that the plaintiff is entitled to recover. The sum he is entitled to is fixed by the case at \$700.35.

*Judgment accordingly.*

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# A DIGEST

OF

ALL THE REPORTED CASES

DECIDED IN

## THE COURT OF QUEEN'S BENCH,

FROM HILARY TERM, 40 VICTORIA, TO EASTER TERM, 40 VICTORIA.

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### ACCEPTANCE.

*Of goods.*—See SALE OF GOODS  
1, 2.

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### ACKNOWLEDGMENT OF TITLE.

See LIMITATION OF ACTIONS, 1.

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### ACTION.

*On covenant—Limitation of.*—  
See LIMITATION OF ACTIONS, 2.

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### ADMINISTRATORS.

See EXECUTORS AND ADMINISTRATORS.

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### AGREEMENT.

See CONTRACT.

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### ALIMONY.

*Right of Senate of Dominion to  
award.*—See COUNSEL FEES.

### AMERICAN CURRENCY.

See BILLS AND NOTES, 1.

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### APPEAL.

*From award under the Railway  
Arbitration Act.*—See RAILWAYS  
AND R. W. COS., 2.

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### APPRENTICES AND MINORS.

*Conviction for misconduct—Satis-  
faction—*38 Vic. ch. 19, secs. 18-20,  
O.—*Construction of.*—Sec. 20 of  
the Apprentices and Minors' Act, 38  
Vic. ch. 19, O., applies only to the  
case of an apprentice who, having  
absented himself as mentioned in  
sec. 19, refuses to serve a further  
term after the expiration of his  
apprenticeship equal to the period of  
such absence, and a complaint under  
it therefore can only be made after  
such expiration, and a refusal to  
comply with sec. 19. A conviction  
under sec. 20, during the currency of  
the apprenticeship, was therefore  
quashed. *Regina v. Walker*, 568.

## ARBITRATION AND AWARD.

See RAILWAYS AND R. W. COS.,  
1, 2.

## ARREST OF JUDGMENT.

See PLEADING, 1.

## ARSON.

*Plea of in an action on insurance policy—New trial refused.*—See INSURANCE, 3.

## ASSAULT.

*Action for assault—Evidence—New trial.*—A number of people, including the plaintiff and defendant, had formed a ring for the purpose of witnessing an expected fight between two persons, one of whom was plaintiff's nephew. The plaintiff, when going forward towards the combatants, was assaulted by defendant, who got into a fight with him, and bit his hand severely. Defendant's counsel proposed to ask the plaintiff, on cross-examination, as to a number of fights in which he was said to have been concerned, but the learned Judge refused to allow this; the counsel being unable to state that it was intended for the purpose of testing the plaintiff's credibility. The evidence as to the defendant's purpose in interfering with the plaintiff was contradictory, and the jury were told that if the defendant's object was only to prevent the plaintiff from interfering with the fight, and not to prevent a breach of the peace, he was a wrong doer.

*Held*, that the evidence was rightly rejected, and the direction right; and a verdict for the plaintiff was upheld.

The erroneous exercise of discretion in refusing to allow questions on cross-examination, which are irrelevant to the issue, would be no ground for a new trial. *Hickey v. Fitzgerald*, 303. Affirmed on Appeal, March, 1877.

## ASSESSMENT AND TAXES.

1. *Tax sale of land vested in the Crown.*—Land vested in Her Majesty in trust for the Indians was exempt from taxation under 13 & 14 Vic. ch. 67; and the defendant here claiming such land under a sale for taxes imposed in 1852 and 1853, was held not entitled. *Regina v. Guthrie*, 148.

2. *Tax sale*—32 Vic. ch. 36, O.—*Omission to return list under sec. 110—Effect of secs. 130, 155.*—Land was sold in January, 1871, for an arrear of taxes assessed in 1867, under a warrant for sale, dated 20th August, 1870. The land was put on the non-resident in place of the resident roll, and the list of land liable to be sold, required by the 32 Vic. ch. 36, sec. 128, O., to be sealed with the corporate seal and signed by the warden, and to be returned to the treasurer with a warrant for sale annexed, was not so sealed or signed or returned. *Held*, that the land could be sold under the 32 Vic. ch. 36, sec. 128, at any time after the taxes had been due for more than three years at the time of the warrant, as they were here; and that the placing the land on the wrong list, and the omission to authenticate and return the list, were defects cured by sec. 155—more than two years having elapsed before this suit since the execution of the tax deed.

No list was returned by the



treasurer to the clerk of the land on which three years' taxes were in arrear as required by sec. 110 ; and sec. 131 enacts that the treasurer shall not sell any lands which have not been included in such lists. *Held*, therefore, that the sale in this case was unauthorized, and that it was not made valid by secs. 130 or 155. *Fenton v. McWain*, 239.

See MUNICIPAL CORPORATIONS, 1.

### ASSIGNMENT.

*After loss, of fire policy.*—An assignment of a claim to compensation under a fire policy, after the loss has occurred, is not a breach of the ordinary condition against assigning without license of the insurers ; but the safer form of transfer is to assign only the money payable in respect of the loss, and not the policy, especially if the loss be partial only, and less than the sum insured. *Kerr v. The Hastings Mutual Fire Ins. Co.*, 217.

*Of chose in action.*—See CHOSE IN ACTION—LANDLORD AND TENANT, 3.

### ATTACHMENT.

*For refusing to answer questions on examination of party under Administration of Justice Act.*—See EVIDENCE, 4.

*For Contempt of Court.*—See CONTEMPT OF COURT.

### ATTORNEY.

*Costs—Taxation of.*—The applicant M. having a claim against one P., placed it in the hands of attorneys, to prosecute the action as she said, but to effect a settlement with P., as they

alleged, and forbidding them to sue. P. agreed to pay \$300 in full, including all costs. The attorneys alleged that \$250 only of this was to go to M. according to her agreement with P., and the remaining \$50 to them for the costs ; while M. denied this, asserting that she was entitled to the \$300, subject to their claim for costs to be taxed : *Held*, there being a doubt as to the facts, that the general rule should prevail, that the attorney must account for all the money received and the client pay his costs. *In re Attorneys*, 372.

### BARRISTERS.

See COUNSEL FEES.

### BARRISTERS CALLED.

158, 564.

### BILLS AND NOTES.

1. *Promissory note*—“*American currency*”—*Pleading.*—A note made here, promising to pay V. or order, at Chicago, \$893, *American currency* : *Held*, a good promissory note. To an action on such note, alleging it to be for the payment of \$893, “*American currency*, to wit, lawful money of the United States of America,” defendants pleaded that American currency was and is certain paper notes or debentures issued by the government of the United States, which by their law passed current for certain purposes only and not universally ; nor was the said American currency at the time of making said alleged note, nor is it lawful money of the United States, nor of any fixed or certain value : *Held*, a good plea, as denying the averments in the de-

claration that American currency was lawful money of the United States of America, and tendering a good issue as to matter of fact. *The Third National Bank of Chicago v. Cosby et al.*, 402.

See CORPORATIONS, 1, 2.

## BILLS OF SALE AND CHATTEL MORTGAGES.

*Chattel mortgage—Description of goods.*—A chattel mortgage described the goods as, “all the goods, chattels, furniture and household stuff whatsoever, the property of the said mortgagor, situate and being in and upon the hotel, stables and premises known as Strong’s hotel, in the said city of London; which said goods and chattels, furniture, and household stuff, are more particularly, but without restriction to the above description, described and set out in the schedule hereto annexed marked A.; that is to say, any goods and chattels, furniture and household stuff, in and upon the said hotel, stables, and premises, not included in the said schedule are not to be excluded from this security.”

In the schedule was contained: “Yard and stables, 1 omnibus, 2 bay horses, aged \* \* the whole of this above named property, goods and chattels, household furniture, horses, and waggons, now being in and upon the premises known as Strong’s hotel,” on, &c.

At the time of giving the mortgage, the mortgagor owned only two horses for the use of the omnibus, one of which was not a bay horse. *Held*, that this horse would not pass by the description in the schedule, but that it passed by the general words in the mortgage as being in and upon the stables and premises, and that the

omnibus clearly passed. *Fitzgerald et al. v. Johnston et al.*, 440.

See CONTRACT.

## BRIDGES.

*Mandamus to county to build.*—*See* MANDAMUS.

## BY-LAW.

*Under Temperance Act of 1864.*—A by-law passed under the Temperance Act of 1864 provided that it should come into force on the 1st of May. *Held*, illegal, as contrary to the Act. *Re O’Neill, and the Corporation of the County of Oxford*, 170.

*To grant bonus to Manufacturing Co.*—*See* MUNICIPAL CORPORATION, 2.

## CHATTEL MORTGAGES.

*See* BILLS OF SALE AND CHATTEL MORTGAGES.

## CHOSE IN ACTION.

*Assignment of—Public officer.*—A declaration on the common money counts by the Postmaster-General, alleged that defendants were indebted to one M., who assigned such debt or chose in action to the plaintiff: *Held*, sufficient, under 38 Vic. ch. 7, D., without alleging that the debt was connected with plaintiff’s office, that being a matter of evidence at the trial. *The Postmaster-General v. Robertson et al.*, 375.

*Assignment of.*—*See* LANDLORD AND TENANT, 3.

## COMPENSATION,

*For land taken by railway.*—See RAILWAYS AND R. W. Cos., 1, 2.

*Under fire policy, where claim assigned after loss.*—See ASSIGNMENT.

## CONSTITUTIONAL LAW.

*Insurance.*—*Held*, that 38 Vic. ch. 65, O., was not beyond the powers of the Provincial Legislature and applied to defendants. *Dear v. Western Assurance Co.*, 553.

See COUNSEL FEES.

## CONTEMPT OF COURT.

*Pending trial.*—While a criminal information for libel was pending against one W., defendant wrote a letter to a newspaper, reflecting upon one of the Judges who had delivered judgment on the application for such information, and stating that W. was “as certain to be convicted as a libeller ever was before his trial.” *Held*, that such letter was clearly a contempt of Court, but the defendant, on an application to commit him therefor, having made a full and unreserved apology, the proceedings were stayed on payment of costs by him, and no fine was imposed. *Regina v. Wilkinson—Re Houston*, 42.

2. *Pending trial—Publication calculated to prejudice.*—Where leave to file a criminal information for libel had been granted on the 29th June, and one B., on the 8th July, published an article tending to prejudice the fair trial of the person against whom such information was to issue, Per HARRISON, C. J., there was a pending litigation, though the infor-

mation had not been filed, and such publication was a contempt of Court.

The information was filed late in Trinity term, and the subpoena served on the applicant (the defendant in the information) on the last day of that term. Per HARRISON, C. J., an application in Michaelmas term, to attach B. for the publication of the 8th July, was not too late.

*Quere*, whether the motion could have been made before the filing of the information.

*Semble*, that a Judge sitting out of term under the A. J. Act, does not represent the full Court, so as to enable him to punish for a contempt of such Court.

B., in the article complained of, which appeared in a paper of large circulation and considerable influence, spoke of the applicant (the defendant) as the author not only of the libels for which the information had been granted, but of scores of others against the same person. Per HARRISON, C. J., this was calculated to prejudice the applicant in his trial.

The applicant had, in a newspaper published by him, spoken of the article in contemptuous terms, and as one which he felt certain would fail of its intention to prejudice his case in Court in the least. Per HARRISON, C. J., the applicant's belief as to the effect of the article was no answer to this application, the question being, whether it was calculated to have the effect of prejudicing his trial.

It was objected also, that the applicant himself had in his paper commented on the judgment of the Court, and distorted its meaning, and had himself continually attacked and libelled B. Per HARRISON, C. J., this was no answer to the application, for the article in question was one scandalizing the Court, not the

applicant only, and had been justified by B. in argument, and the offence was therefore not against the applicant, but against the Court.

The article, which is set out in the report, was held to be clearly a reckless, intemperate and unjustifiable attack upon a Judge of this Court for a judgment pronounced by him with the other Judges, and a contempt therefore of the Court.

MORRISON, J., was of opinion, 1. That the application, so far as it respected the applicant himself, was too late; 2. That he had failed to sustain the constructive contempt founded on the allegation that the article was calculated to prejudice him on his trial; and 3. That having so failed, he was not, under the circumstances, entitled to ask the Court to punish the author, at his suggestion, for the direct contempt of the Court, contained in the article published so long ago, and which the Court itself had not deemed worthy of notice.

WILSON, J., took no part in the judgment; and the Court being equally divided the application dropped. *Regina v. Wilkinson—Re Brown*, 47.

See EVIDENCE, 4.

## CONTRACT.

*Covenant to pay a sum to be ascertained on settlement of accounts—Construction—Right of Action.*—The defendant executed a chattel mortgage to the plaintiffs, reciting that he was indebted to them in a large sum of money, the amount whereof had not been ascertained by settlement of accounts between them. The proviso was, that if the defendant should pay to the plaintiffs such sum

as should be found due on a settlement between them, the instrument should be void; and defendant covenanted to pay to the plaintiffs the said sum of money so to be found due as aforesaid. In an action on this instrument, the plaintiffs alleged in one count that the defendant was at the date of the deed indebted to them in \$1,000, which would have been found due on a settlement, but that defendant, though requested, would not come to a settlement, nor pay the said sum. In another count it was alleged that defendant was indebted to the plaintiffs in \$1,000 for goods sold, &c., and defendant by deed acknowledged such indebtedness; and by reason of the non-payment an action had accrued to the plaintiffs to demand the same. The deed having been set out at length in the plea:

*Held*, that it sustained the declaration and entitled the plaintiffs to maintain the action, the amount of damages being a matter to be proved at the trial. *Garland et al. v. McDonald*, 573.

## CONVERSION.

*Of promissory notes.*—See TROVER, 1.

See DIVISION COURT.

## CONVICTION.

*Under the Apprentices and Minor's Act.*—See APPRENTICES AND MINORS.

See EVIDENCE, 1.

## CORPORATION.

1. *Agreement by secretary of proposed company—Personal liability—*



*Equitable defence—Pleading* ]—The plaintiff sued defendant on an alleged agreement, that in consideration, that the plaintiff would make a promissory note payable to the defendant's order for \$500, and deliver it to defendant to be negotiated, defendant promised that the plaintiff should at any time before the maturity of the note have the option of subscribing for one share of \$500, in a company to be incorporated under "The Ontario Joint Stock Letters Patent Act, 1874," and called the Aldershott Match Company; and that, if the plaintiff should before such maturity decline to take said share, the said company would take up the note and indemnify the plaintiff against it. The declaration averred that the plaintiff delivered the note to defendant, who negotiated it; that before its maturity the plaintiff declined to take the share, and so notified defendant, but that neither the defendant nor the company took up the note, and the plaintiff had to pay it.

Defendant pleaded, on equitable grounds, that he was one of the projectors and secretary of said company, and as such before the issue of the Letters Patent applied to the plaintiff to take a share, which the plaintiff agreed to do on the terms of the following receipt then given by him to the defendant:—

"Hamilton, 13th April, 1876.

"Mr. Thomson has given me his note for \$500 for one share in the Aldershott Match Company, which he has the privilege of declining at the expiry of the note; and if so this company will take up the note.

C. FEELEY, Secretary."

That defendant then gave his note accordingly: that afterwards the company was incorporated: that the defendant was a shareholder and the secretary, and in that capacity only endorsed the note to the company, which accepted it on the terms of the receipt and discounted it: that before

its maturity the plaintiff notified the company that he declined to take the share, but afterwards withdrew such notice and paid the note at maturity, and was treated as a shareholder, and voted and acted as such at meetings of shareholders: that it was not the intention of either plaintiff or defendant that defendant should be personally bound by the receipt, or in respect of said note or share, but they both intended that the plaintiff should look only to the company in his dealings under the receipt in respect of said share, and defendant was described in the receipt as secretary in order to exempt him from personal liability; and he denied any fraud (which was charged in the second count) and denied that he contracted with the plaintiff as alleged.

*Held*, that the defendant was *prima facie* personally liable, there being at the time when he signed the receipt no company, and therefore no principals whom he could bind.

The part of the plea was proved, alleging the intention of the parties to have been that defendant should not be personally bound by the receipt, but that the plaintiff should look only to the company.

*Semble*, that this could form no defence, being in contradiction of the written agreement. But the parties having gone to trial on the plea, and there being a verdict for the plaintiff, the verdict was ordered to be entered for defendant on that branch of the plea, and the plaintiff left to move in arrest of judgment, unless defendant should elect to amend his plea.

Suggestions as to a form of plea which might shew a good defence. *Thomson v. Feeley*, 229.

2. *R. W. Co.—Power to draw bills—Liabilities for money paid.* ]—The

defendants desiring to raise money drew a bill and requested the plaintiffs to endorse for their accommodation, which the plaintiffs did, and defendants having discounted and failed to meet it, the plaintiffs paid it to the bank. *Held*, that assuming that the defendants had no power to draw the bill, they were nevertheless liable to the plaintiffs as for money paid for them. *Brockville and Ottawa R. W. Co. v. Canada Central R. W. Co.*, 431.

See MUNICIPAL CORPORATIONS—RAILWAYS AND R. W. COS., 5.

### COSTS.

*Taxation of.*]—See ATTORNEY.

See COUNSEL FEES.

### COUNSEL FEES.

*Right of action for*—*Bill for divorce and alimony.*]—*Held*, HARRISON, C. J., dissenting, that counsel in this Province have the right to maintain an action for their fees.

Defendant having presented a bill to the Senate for a divorce from his wife, the plaintiff was retained by the wife as counsel before the committee of the Senate to oppose the bill. The defendant being informed that he must pay from day to day into the committee the costs of his wife's defence, promised the plaintiff that if the plaintiff would not insist on defendant so paying his fees, he would pay them to the plaintiff when taxed. The committee having reported the preamble of the bill not proven, the wife applied to the Senate for a divorce and for maintenance, and retained the plaintiff to support such application. Per WILSON, J.

1. The Senate could have no power to award alimony, and the plaintiff could not recover for his fees in promoting a bill for that purpose; 2. If counsel fees could not be recovered by a counsel from his client, the plaintiff here could not recover upon the express contract; 3. The court, upon such express agreement, set out in the report, sufficiently shewed a right of action in the plaintiff against the defendant. *McDougall v. Campbell*, 332.

### COVENANT.

See CONTRACT.

### CRIMINAL INFORMATION.

*Delay in moving for.*]—See DEFAMATION, 1.

See CONTEMPT OF COURT. 1, 2.

### CRIMINAL LAW.

*False pretences.*]—Defendant was indicted for obtaining by false pretences from M. an order for the payment of \$806.69, the property of P., with intent to defraud.

It appeared that a suit was pending in Chancery, in which the defendant, who was a solicitor, but had been struck off the rolls, was acting for P. Defendant procured V., his clerk, to write a præcipe in the name of McG., who had acted as counsel on defendant's instructions, for \$806.69 of the moneys standing to the credit of the cause, and to sign McG.'s name to it. V. left it with M., the accountant in Chancery, who prepared a check payable to P. or order. Defendant then got one H., a solicitor, to get the check from the accountant

and sign McG.'s name to the receipt, on which H. handed the check to defendant, who got P. to endorse it, and paid P. \$400, keeping the rest for costs.

*Held*, that the defendant was rightly convicted, for he obtained the check from the accountant by fraud and forgery, and with intent to defraud him; and he was not the less guilty because P. was entitled to the money, and there was no sufficient proof of intent to defraud P. *Regina v. Parkinson*, 545.

See APPRENTICES AND MINORS—EVIDENCE, 1.

## CROWN LANDS.

*Enrolment.*—Enrolment of a surrender to the Crown is unnecessary in this country to perfect the title of the Crown. *Regina v. Guthrie*, 148.

*Exempt from taxes.*—See ASSESSMENT AND TAXES, 1.

## CURRENCY.

See BILLS AND NOTES, 1.

## DAMAGES.

*For conversion of promissory note—Reduced to nominal damages, on bringing the note into Court.*—See TROVER, 1.

See CONTRACT.

## DEED.

*Iron ore.*—Before the execution of a deed certain ore in question had been severed from the land in Quebec, but the deed purported to convey not only the land, but all iron and other

ores which might have been at any time severed from the land. *Held*, that the ores passed by this conveyance, for though a chattel, and the conveyance would not, except in equity, pass the legal title to it, yet the heir in whom it was vested would be a trustee for the administrator, the donee of the power, and it might be presumed that such donee, as *cestui que trust*, had authority from the heir as trustee to dispose of it. *Stuart v. Baldwin*, 446.

*Proof of, by memorial thirty years old.*—See MEMORIAL.

## DEFAMATION.

*Libel—Criminal information—Delay in application for—Denial of the charge complained of.*—S., the relator, Senator of the Dominion and president of a bank, applied on the last day of Michaelmas Term, 1875, for a criminal information against one W., the editor of a newspaper, for three alleged libellous articles published therein. The first, published on the 5th November, 1875, charged the relator with political intriguing, alleging that "his now famous circular to the electors of South Ontario, his extending credit at a suspicious time to institutions that control votes, his impudent letter to the Finance Minister, his consultation with the Government as to his reply to certain charges made against him, all point too clearly to the fact of intrigues in political matters." The second article, published on the 12th November, 1875, accused him of having purchased the votes of three members of Parliament on the occasion of a political crisis referred to, and of having boasted of so doing. The third article, published on the



19th November, 1875, accused the applicant of corruption; referred in terms of ridicule to his assertion that he had never spent a dollar to purchase or secure a vote, and reiterated the charge of buying up members.

The substance of the libels of the 12th and 19th November had previously appeared in defendant's paper of the 17th September, but the relator swore that he had no recollection of having seen it.

*Held*, 1. That the application was not too late.

The complainant must come to the Court either during the term next after the cause of complaint arose, or so soon in the second term thereafter as to enable the defendant, unless prevented by the accumulation of business in the Court, to shew cause within that term; and this without reference to the fact whether an assizes intervened or not.

2 As to the first article, that the applicant's denial of the charge then made was not sufficient; for though his affidavit denied in general terms the charges made, it contained no reference to the circular, or to the letter referred to in the article, or to the alleged consultation with the Government; and these matters being specified in the article as justifying the charge of political intriguing, the Court should have been informed with regard to them, so as to enable them to judge whether they formed ground for the charge. The information as to this article was therefore refused, and the applicant left to his ordinary remedy.

The denial in such an application must, as a rule, be full, clear, and as specific as possible; and all the circumstances must be laid before the Court fully and candidly, in order that they may deal with the matter.

Per WILSON, J., upon the circular referred to, and upon other documents set out, and which were brought before the Court by the defendant, the charge of political intriguing was so far sustained, that the application should be refused on this ground also.

The charges in the second article were, as set out in the affidavits in the report, held to be sufficiently denied. There was no affidavit of their truth, and no suggestion that the defendant had any personal knowledge of the facts on which the charges rested, so that he would be prejudiced by being excluded as a witness on his own behalf. As to these, therefore, the information was granted. *Regina v. Wilkinson*, 1.

*See* CONTEMPT OF COURT—EVIDENCE, 4.

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#### DEMURRER.

*See* INSOLVENCY, 1.

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#### DESCRIPTION OF GOODS.

*See* BILLS OF SALE AND CHATTEL MORTGAGES, 1.

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#### DISTRESS.

*By guardian of infant.*—*See* INFANT.

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#### DIVISION COURT.

*Executions—Interpleader—Insolvency proceedings—Priorities—Jus Tertii.*—The bank, the three defendants C., and the defendant R., each had executions in the Division Court against one D., in the hands of defendant Cowan, as bailiff, who seized the goods in question in July,



1875, and advertised them for sale. One O'C. gave notice of claim, and there was an interpleader between him and the bank, on which judgment was given on 30th November, 1875, against the claimant.

On 15th November an attachment in insolvency issued against D., the execution debtor, and the official assignee gave notice thereof to the bailiff, defendant Cowan, who on the 4th December, being indemnified, sold the goods. The plaintiff claimed as a purchaser from O'C., who claimed under a chattel mortgage from D., dated 25th January, 1875, and obtained the goods on 27th November, 1875, from the official assignee, who knew nothing of the interpleader, and sold them to the plaintiff, from whom the bailiff took them. The plaintiff having sued in trespass and trover, was nonsuited.

*Held*, that as between the plaintiff and the execution creditors, the plaintiff by the interpleader judgment was postponed to them : that the assignee had priority over the execution creditors, but not necessarily over the plaintiff as mortgagee ; and a new trial was granted in order to determine whether the plaintiff could, by setting up the insolvency proceedings and the claim of the assignee, recover against defendants.

On a second trial, the jury having found a general verdict for defendants: *Held*, that the plaintiff, unless suing under and by authority of the assignee, and of which there was no evidence, had no right to avail himself of the assignee's title ; and the verdict was affirmed.

*Quere*, if this were otherwise, whether the plaintiff, on the evidence set out in the report, could have recovered against the defendants as for a joint trespass or conversion. *O'Callaghan v. Cowan*, 272.

## DIVORCE.

*Counsel fees, for services before committee of the senate.*—See COUNSEL FEES.

## ELECTIONS.

*Under Temperance Act of 1864.*—See TEMPERANCE ACT OF 1864.

See PARLIAMENT.

## ENROLMENT.

Enrolment of a surrender to the Crown is unnecessary in this country in order to perfect the title of the Crown. *Regina v. Guthrie*, 148.

## ENTRIES AGAINST INTEREST.

See EVIDENCE, 3.

## ESTOPPEL.

*By acquiescence.*—See LANDLORD AND TENANT, 2.

## EVIDENCE.

1. 36 Vic. ch. 10, sec. 4, O.—*What is "a crime."*—An information under 37 Vic. ch. 32, secs. 28 and 34, O., for selling intoxicating liquors on Sunday, was held to be so far a charge of a criminal character that the defendant could not be compelled to give evidence against himself, under the 36 Vic. ch. 10, sec. 4, O., which authorizes such evidence in any matter "not being a crime." A conviction for such offence obtained on defendant's evidence was therefore quashed.

The 36 Vic. ch. 10, sec. 4, is not repealed or affected, as regards proceedings under the Tavern and Shop Licenses Act, by 37 Vic. ch. 32, O. *Regina v. Roddy*, 291.

2. *Rejection of.*]—The erroneous exercise of discretion in refusing to allow questions irrelevant to the issue is no ground for a new trial. *Hickey v. Fitzgerald*, 303.

3. *Entries against interest.*]—In ejectment for a cottage, defendant claimed by length of possession, which she proved. The widow of one T., deceased, who had owned the property, stated that defendant's husband came to live in the cottage, which was on T.'s farm, as T.'s servant, paying no rent; that defendant, on her husband's death in 1866, remained in the house, and in 1870, agreed with T. to pay him \$1 a month rent, which she paid every three months until the Fall of 1873. T. died in January, 1873.

The following and similar entries in T.'s cash book, in his handwriting, relating to defendant:—"1871, February, Mrs. Dewan (deft.) \$3; May, Mrs. Dewan, \$3; August 1st, Mrs. Dewan, \$3," &c.—

*Held*, admissible, as entries against interest; and that taking them in connection with Mrs. T.'s evidence, which they confirmed, the plaintiff was entitled to succeed. *Turner v. Dewan*, 361.

4. *Examination under A. J. Act 1873—Refusal to answer—Attachment—Intituling papers—Waiver.*]—On an examination of the defendant under the A. J. Act 1873, in an action for slander, he was asked what pleas he had pleaded, whether his plea of not guilty was true or untrue, and whether he knew that he had

pleaded such a plea. He refused to answer until the pleas were produced. On application to attach him for contempt:

*Held*, that he was not bound to answer what pleas he had pleaded, and that verified copies of the pleadings should have been before the examiner, when the question would have been unnecessary.

In the writ of summons and declaration the defendant was described as "Joseph Aloysius Donovan," and in the affidavits for this rule and in the rule as "Joseph A. Donovan." But in the order for his examination, and the appointment made on it he was also described as Joseph A. Donovan, and it was admitted that he attended upon them and was examined, and stated that he was the defendant, the depositions being entitled in the same way. *Held*, that the objection, which would otherwise have been fatal, had been waived. *O'Donohoe v. Donovan*, 591.

*Proof of deed by memorial thirty years old.*]—See MEMORIAL.

*Rejection of.*]—See ASSAULT.

## EXAMINATION.

*Of party under Administration of Justice Act—Refusal to answer.*]—See EVIDENCE, 4.

## EXECUTORS AND ADMINISTRATORS.

*Will—Construction—Power to sell—Ore severed from the land.*]—Replevin for iron ore taken from land in the province of Quebec. It appeared that R., the patentee of

the land, by his will, made in 1829, authorized his executors to sell and convey all his estate, real and personal, for such considerations, upon such terms, and in such manner as they might judge best, and bequeathed the proceeds to different persons. Four executors were named, of whom only two proved the will, and the last of these two died in 1861. Administration with the will annexed was granted on the 20th of May, 1873, to E. S., who conveyed to the plaintiff on the 31st of May.

*Held*, that under 36 Vic. ch. 20, sec. 40, O., E. S., clearly had power to sell to the plaintiff. *Stuart v. Baldwin*, 446.

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## FALSE PRETENCES.

*See* CRIMINAL LAW.

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## FIRE INSURANCE.

*See* INSURANCE.

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## FOREIGN LAW.

*Case stated under Imperial Statute 22 & 23 Vic. ch. 63.*]—Certain land was situate in the province of Quebec, and a case was sent, under the Imperial Statute 22 & 23 Vic. ch. 63, for the opinion of the Court of Queen's Bench there. That Court decided, thereupon, that the deed by the administrator passed the land and ores to the plaintiff: that defendant had no title sufficient to defeat it: that a certain judgment, set out in the case, recovered by the defendant against the plaintiff there, had no effect upon the plaintiff's title; and that the plaintiff by their law could maintain an action for both the land and the

ore, before the ore was removed from that province, but not for the ore until the title, if in dispute, had been established by a petitory action to which the action for the ore would be incident. *Held*, that the inability to sue for the ore there, except as incidental to the right to the land or after it had been determined, formed no reason why our Court here should not adjudicate with respect to the ore.

Remarks as to the meaning of the term *bonâ fide* possessor of land; and *Quære*, whether the defendant could claim to be so. *Stuart v. Baldwin*, 446.

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## FRAUD.

*Charge of in declaration against an insolvent.*]—*See* INSOLVENCY, 1.

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## GUARDIAN.

*Power of to distrain for rent.*]—*See* INFANT.

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## HIGHWAYS.

*Neglect to repair.*—*See* WAYS, 2.

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## IMPROVEMENTS.

*Estoppel by acquiescence in.*]—*See* LANDLORD AND TENANT, 2.

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## INDIAN LANDS.

*Exempt from taxes.*]—*See* ASSESSMENT AND TAXES, 1.

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## INFANT.

*Guardian—Power to lease land.*]—In replevin defendant avowed for rent, alleging that the plaintiff

held the premises as tenant thereof to one L. as guardian of M., under a demise at a yearly rent of \$350 : that L. after making the lease, and about the 2nd of April, 1877, died intestate, without appointing any guardian to M. : and defendant was, on the 21st May, 1877, appointed by the Surrogate Court guardian of M. in place of L. ; and because \$272 of the rent was due from plaintiff to defendant as such guardian, defendant took the goods as a distress therefor.

*Held*, on demurrer, that the plaintiff must succeed, for in this Province a guardian, having no estate in the land as in England, cannot lease his ward's land in his own name ; and if he could his lease would determine on his death or on the ward attaining full age : that if the demise was by deed the personal representative of L. only could sue for the rent ; and if not by deed the defendant might recover the rent in the name of the infant, but could not avow for it in his own right as guardian. *Collins v. Martin*, 602.

## INFORMATION.

See CRIMINAL INFORMATION.

## INSOLVENCY.

*Insolvent Act of 1869—Charge of fraud under secs. 92, 93—Trial—Pleading.*—Where a defendant was sued for a debt, and, under secs. 92, 93 of the Insolvent Act of 1869, was charged in the declaration with fraud committed in incurring such debt : *Held*, that such fraud might be proved in the action and defendant declared guilty, whether the case was tried by a common jury or by a Judge without a jury.

*Regina v. Kerr*, 26 C. P. 214, distinguished, as having been an indictment for an offence under section 147.

The defendant in such a case may plead or demur to that part of the declaration which charges the fraud. *Rutherford v. Eakins*, 27 C. P. 55, commented upon. *Elley et al. v. Pratt*, 365.

See DIVISION COURT — SALE OF GOODS, 2—TROVER.

## INSURANCE.

1. *Fire policy—Assignment after loss—Representation as to value and title.*—An assignment of a claim to compensation under a fire policy, after the loss has occurred, is not a breach of the ordinary condition against assigning without license of the insurers ; but the safer form of transfer is, to assign only the money payable in respect of the loss, and not the policy, especially if the loss be partial only, and less than the sum insured.

The application for the policy described the stock in trade to be worth \$5,000, and the ownership of the goods was stated to be in the two Messrs. R., whereas the value was only \$3,500, and the stock only belonged to the two, the rest of the property belonging to them in separate portions, and part to the wife of one.

The statements in the application were declared by the insured to be “a just, full, and true exposition of all the facts and circumstances in regard to the condition, situation, value, and risk of the property to be insured, so far as the same are known to me and are material to the risk. And I hereby agree and consent that the same shall be held to form the basis of the liabilities of said com-



pany, and be binding upon me as material representations in reference to the insurance to be granted hereon." It was left to the jury to say whether the insured made any misrepresentation or misstatement in the application for insurance, or any fraudulent claim against the company, and they answered in the negative.

*Held*, that the whole declaration was qualified by the words "so far as the same are known to me and are material to the risk:" that the question asked of the jury was substantially a question whether the value was stated by the assured truly so far as known to him; and that on the evidence their finding could not be disturbed.

*Held*, also, that the words "in regard to the condition, situation, value, and risk of the property to be insured" did not apply to the goods being joint or several property, and that it was not material to the risk.

An allowance of \$200 was made to the defendants under a condition that in case of the removal of property to save it the defendants would contribute ratably with the assured and other companies interested to the expense of salvage, and the damage sustained by the removal. *Kerr v. The Hastings Mutual Fire Ins. Co.*, 217.

2. *Life insurance—Representations as to health of insured—Dyspepsia—Personal injury not communicated—Attendance by physician.*—One M. obtained a policy of insurance on his life, issued and accepted on the conditions therein set out, one of which was that the answers in the application, which was made a part of the contract, were warranted by the assured to be true in all respects, and that if the policy had been obtained

by any misrepresentation or concealment, it should be void. Among the questions and answers in the application were: 7. Have you ever had any of the following diseases: Dyspepsia? *Answer*: No. 8. Have you had any other illness, local disease, or personal injury? and if so of what nature? How long since? What effect on general health? *Answer*: No. 14. How long since you were attended by a physician? For what disease? Give name and residence of such physician. *Answer*: About thirty years ago—Lake fever—Dr. S. of, &c., now dead. Name and residence of your usual medical attendant. *Answer*: Dr. B., who attended my family, has known me some years. Have you reviewed the answers to the above questions, and are you sure that they are correct? *Answer*: Yes. At the end was a declaration and warranty that the above were fair and true answers to the questions; and an agreement that if there should be in any of the answers any untrue or evasive statements, or any misrepresentations or concealment of facts, the policy should be void.

The evidence shewed that the deceased about 14 or 15 years before had been thrown out of a sleigh, and sustained a fracture and loss of a portion of his skull, which, however, had not affected his general health: that his last illness occurred soon after a blow upon his head, received by striking against a bolt in his warehouse, and that during it he was trephined, when a new depression, arising from the old injury, was discovered, close to the seat of the new one: that he was a reckless rider, getting frequent falls: that he occasionally suffered from indigestion, but never in a chronic form; and that during the last ten years he had been attended by three physicians, besides

Dr. B. above mentioned, but for trifling ailments only.

The jury, in answer to questions, found that the insured had not been afflicted with dyspepsia: that he had no personal injury which must have been present to his mind as something coming fairly within the term personal injury: that he had no serious or severe personal injury which through forgetfulness or inadvertence he did not communicate, nor any personal injury which he might fairly be expected to communicate for the defendant's information, or which had any effect on his general health.

*Held*, that the representations being clearly warranties, their truth and not their materiality was alone in question: that the answer to the seventh question was right upon the evidence; but that, notwithstanding and consistently with the answers to the other questions, the plaintiff could not recover, for, as to the eighth question, the insured was bound to mention an injury so serious and unusual as a fracture of the skull, whether it affected his general health or not. And as to the 14th question, the answer, that it was about thirty years since he had been attended by a physician, was clearly untrue. A verdict was therefore entered for the defendants. *Moore v. Connecticut Mutual Life Insurance Co.*, 497.

3. *Fire insurance — Part of the loss payable to others — Right of plaintiff to sue — Incumbrancer — Misrepresentation and concealment — New trial — 38 Vic. ch. 65, O. — Power of Provincial Legislature.*]— Action on a fire policy effected with the plaintiff for \$2,500, by which the loss, if any, was made payable to W. to the extent of \$1,000, and

to B. to the extent of \$400, "as their interest may appear." *Held*, that the plaintiff might sue in her own name, being entitled to the surplus above these sums, which was found by the jury to be \$130, the words "as their interest may appear," applying to a reduction of these sums, not to a payment beyond them.

The verdict being for \$1,530, releases were offered on behalf of B. and W., and the Court therefore thought it unnecessary to consider whether they should be made parties to the suit.

The application contained a question, "If encumbered, state to what amount," to which no answer was made, but on the face of the application was written, "Loss, if any, payable to Joseph Watson, \$1,000; H. G. Bernard, \$400, or as their interest may appear." The agent who took the application said he knew from this that the property was encumbered. There was also a mortgage given by a former owner on this and other property to one Whitney, of which, however, the plaintiff knew nothing. *Held*, that there was no misrepresentation or concealment in either case.

By the policy the plaintiff was bound to use all possible diligence in case of fire in saving and preserving the property insured, and the jury having found in her favour on this issue, upon the contradictory evidence set out in the case, the Court refused to interfere.

They found also for the plaintiff on the plea of arson, for which she had been prosecuted and acquitted; and the Court, notwithstanding very strong circumstances of suspicion, which are stated in the case, refused a new trial.

*Held*, also, that the 38 Vic. ch. 65, O., was not beyond the power of the Provincial Legislature, and applied to the defendants. *Dear v. Western Assurance Co.*, 553.

### INTEREST.

*Municipal Corporation — Debentures.*]—*Held*, following, but not agreeing with, *The Corporation of North Gwillimbury v. Moore*, 15 C. P. 445, that the corporation could allow interest at more than seven per cent. on debentures issued to complete a gravel road. *Re Nichol and the Corporation of the Township of Alnwick*, 577.

### INTERPLEADER.

*See* DIVISION COURT.

### JOINT STOCK COMPANY.

*Conditional subscription for shares.*]—*See* RAILWAYS AND R. W. COS., 5.  
*See* CORPORATION, 1.

### JUDGE.

*Trial before, without jury.*]—*See* INSOLVENCY, 1.

### JUDGMENT.

*Judgment—Revivor—Limitation* 38 Vic. ch. 16, sec. 11.]—A writ of revivor or suggestion entered upon the roll is a "proceeding," and a judgment is to be considered as "charged upon or payable out of land" within the 38 Vic. ch. 16, sec. 11, O., so that it cannot be revived by writ or suggestion after ten years.

In this case the defendant did not set up the limitation upon the hearing of the rule to revive, and relief was on this ground refused to him. *Caspar v. Keachie et al.*, 599.

### JURISDICTION.

*See* FOREIGN LAW.

### JURY.

*See* INSOLVENCY, 1.

### JUS TERTII.

*See* DIVISION COURT—TROVER, 1.

### LANDLORD AND TENANT.

1. *Lease—Construction—Allowance out of rent.*]—The plaintiff leased a tavern to defendant for three years at a rent of \$400 a year, payable quarterly, "the said lessor to allow the said lessee the amount he has to pay as license fees out of the first quarter's rent in each year." The license fee when the lease was executed, and for some years previously, was \$85; but in the following year it was raised to \$200. *Held*, that the lessee could claim no allowance beyond the first quarter's rent, the lessor being bound to allow the fee only provided it did not exceed such rent. *Writt v. Sharman et al.*, 249.

2. *Lease—Surrender by operation of law—Acquiescence in improvements—Estoppel.*]—In ejectment for a village lot, the plaintiff claimed under a lease from K., one of the defendants, which the defendants alleged had been surrendered by



operation of law. The lease was made in 1873, for ten years, to the plaintiff, who took possession, and built a house on it, which in October, 1875, was destroyed by fire, and in February, 1876, the plaintiff became insolvent. There was rent in arrear, which the plaintiff could not pay; K.'s attorney said he was willing to take the place off their hands; and either the plaintiff or his wife delivered to him a copy of the lease, which he supposed to be the original, saying the lease was given up; plaintiff's wife afterwards told K. that the lease was given up, and K. promised to lease to her a shop in a block she was then building. K. then leased this land to the other defendants, who at once proceeded to expend about \$3,000 in building upon it, which the plaintiff, living in the village, though aware of it, made no objection to; but when the foundation was nearly completed he registered the lease. A difficulty arose as to the other lease promised to the plaintiff's wife, and the plaintiff brought ejectment. The learned Judge, who tried the case without a jury, held that there had been a surrender of the lease by operation of law, and that the plaintiff was precluded by his acquiescence from disputing defendants' title, notwithstanding the alleged notice to them by registration of the lease.

*Held*, that the finding was right upon both points, and that the plaintiff could not recover. *Acheson v. McMurray et al.*, 484.

3. *Lease—Agreement to renew—“Release”—Construction of—Mistake—Reformation of agreement—Assignment of chose in action—35 Vic. ch. 12, O.*—On 1st of November, 1871, the defendant by deed leased land for five years to the plain-

tiff, who agreed in lieu of rent to clear certain specified portions. Appended to the lease was an agreement, dated 25th January, 1876, which was to form part of the lease, “that in the event that the lessee shall get a release of the premises now leased, after the expiration of the said lease, then the value of a certain barn built by the lessee on the said premises shall be allowed to apply to the rent which shall be payable during the said release. The value of the said barn is \$400. In the event that there be no release as aforesaid, that the lessor shall pay to the lessee the sum of \$400 for the said barn, at the expiration of the said lease.”

It was alleged that this agreement by mistake omitted to provide for a reference to arbitration as to the term of the renewal lease, (it being clear that by the term “release,” the parties intended a renewal lease;) but the evidence as to such mistake was chiefly the verbal testimony of defendant, which the plaintiff denied. *Held*, that the agreement clearly could not be reformed by adding such provision.

*Held*, also, that the term “release” must be construed to mean a renewal of the old lease, and therefore a lease for the same term. And, *Seemle*, that the rent would be payable, as before, by improvements, *i. e.*, by the barn.

The defendant having refused to grant a new lease for more than three years, the plaintiff was therefore held entitled to recover the \$400.

On the 21st of June, 1876, the plaintiff assigned to one S. all his claim under the lease, with power to use his name for the collection of the same; but it was proved that this assignment was intended as security only for money lent by S. to the



plaintiff. *Held*, following *Hostrawser v. Robinson*, 23 C. P. 350, that the plaintiff, notwithstanding the 35 Vic. ch. 12, O., might sue in his own name. *Dawson v. Graham*, 532.

See INFANT.

## LEASE.

See INFANT—LANDLORD AND TENANT, 1, 2.

## LIEN.

*For purchase money of goods—Loss of ly delivery.*]—See SALE OF GOODS, 2.

## LIFE INSURANCE.

See INSURANCE, 2.

## LIMITATION OF ACTIONS.

1. *Ejectment—Statute of Limitations.—Acknowledgment of title.*]—In ejectment the defendant claiming by length of possession, it appeared that W. S. went into possession in 1855, claiming through J. W., who had been in possession since 1849, but had no other title. In 1861 W. S. released to his daughter G., who was not proved to have ever taken possession, and in 1867 G. and W. S. conveyed to the defendant. In 1863 W. S. being in possession signed an agreement, set out in the report, to purchase the land from the plaintiff.

*Held*, that this, being an acknowledgment of the plaintiff's title by the person in possession, took the case out of the statute, and entitled the plaintiff to succeed.—*Cahuac v. Cochrane*, 436.

2. *Covenant in mortgage—Limitation*—38 Vic. ch. 16, sec. 11, O.]—An action on the covenant in a mortgage for payment of the mortgage money must, under 38 Vic. ch. 16, sec. 11, O., be brought within ten years.—*Allan v. McTavish*, 567.

The case has since been reversed on appeal. The decision in appeal is not yet reported.

See JUDGMENT—WAYS, 2.

## LIQUOR, SALE OF.

See EVIDENCE, 1.—TEMPERANCE ACT OF 1864.

## MANDAMUS

1. *County Council*—36 Vic. ch. 48 sec. 413—*Obligation to build bridge.*] By the Municipal Act of 1873, sec. 413, as amended by 37 Vic. ch. 16, sec. 19, "it shall be the duty of County Councils to erect and maintain bridges over rivers forming or crossing boundary lines between two municipalities within the county." The Grand river runs between the townships of Oneida and Seneca. A bridge had been erected over it at the village of York, between the villages of Caledonia and Cayuga, about eighteen years before, by a joint stock company, and having been abandoned by the company had become unfit for travel, leaving a distance of twelve miles, from Caledonia to Cayuga, without any bridge.

*Held*, HARRISON, C. J., dissenting, that under these circumstances, and upon the affidavits, which are fully stated in the report, a mandamus should go directing them to build a bridge at or near the village of York. *Re Brooks and the Corporation of the County of Haldimand*, 381.

## MANUFACTURING CO.

*Bonus to.*]—See MUNICIPAL CORPORATIONS, 2.

## MASTER AND SERVANT.

See APPRENTICES AND MINORS.

## MEMORANDA.

See pages 158, 564.

## MEMORIAL.

A memorial, over thirty years old, executed by the grantor, was held admissible evidence and sufficient proof of the deed, in an action of ejectment, under 39 Vic. ch. 29, sec. 1, sub-sec. 3, and sec. 7, O. *Regina v. Guthrie*, 148.

## MINES AND MINERALS.

See DEED—EXECUTORS AND ADMINISTRATORS.

## MISTAKE.

*In agreement as drawn up—Reformation of.*]—See LANDLORD AND TENANT, 3.

## MONEY.

*Of foreign country.*]—See BILLS AND NOTES, 1.

## MONEY PAID.

See CORPORATION, 2.

## MORTGAGE.

See CONTRACT—INSURANCE, 3—LIMITATION OF ACTIONS, 2.

## MUNICIPAL CORPORATIONS.

1. *County corporation—Grant to roads and bridges—Equalization of rolls.*]—A county council by by-law granted moneys to different municipalities in the county, to assist said municipalities “in preserving, improving, and repairing roads and bridges therein,” and to be expended by such municipalities “where required, as they may deem expedient for the benefit of the public of said county.” It was alleged that these moneys were a portion of surplus funds derived from various sources, not required for the current year’s expenditure, and it appeared that similar grants had been made in previous years.

*Held*, that the by-law was clearly *ultra vires*, and must be quashed.

The assessment of two municipalities had been decreased, and that of two others increased by the County Judge, after the equalization made by the county council, and it appeared that one object of the by-law was, to make this up to the municipalities so increased, the two which were reduced receiving no grant by the by-law, and the grant to the other two being increased by the amount which the Judge had put on against them. Remarks upon such attempted evasion of the law.—*Re Strachan and the Corporation of the County of Frontenac*, 175.

2. *By-law to grant bonus—Councillors interested in the company to be aided—Illegality*—36 Vic. ch. 48, sec. 75, O.]—A by-law to grant a bonus of \$10,000 to a manufacturing company was proposed by a council consisting of five members, of whom four were shareholders in the company. The by-law provided for raising that sum on debentures, but

that the company should get nothing until they furnished evidence to the satisfaction of the council of being in *bona fide* working operation, and an institution otherwise worthy of the bonus, and that they had a *bona fide* paid up capital of at least \$5,000. The votes of the electors were taken on it on the 21st October, 1876, when it was carried by a majority of 23. On the 26th February, 1877, a motion was made to quash it, no debentures or money having yet been delivered. Three of the members for 1876 were again in the council for 1877, all being shareholders, and two of them directors of the company.

*Held, per HAGARTY, C. J., and affirmed by this Court, that the by-law must be quashed; that under sec. 75 of the Municipal Act, 36 Vic. ch. 48 O., a councillor cannot vote on any question affecting a company of which he is a shareholder, even though at the time of election he was not disqualified under that clause, so that here there was no competent quorum to submit or pass the by-law; and that the vote of the majority of the electors could not be treated as a ratification, even if they were shewn to have been aware of the illegality. —Re Baird and the Corporation of the Village of Almonte, 415.*

3. *Arrangement between municipalities under 36 Vic. ch. 48, sec. 430, sub-sec. 2, O.—Construction of —Rate of interest allowed on debentures —By-law to raise money—Notices.*—The corporation of the township of A. passed a by-law under the Municipal Act of 1873, sec. 430, sub-sec. 2, providing that an arrangement should be entered into by the council with two other townships for executing at their joint expense, and

for their joint benefit, the work upon a gravel road through the township of A. It recited that \$3,000 would be required to defray the expenses of the township in the work: that it was intended to borrow that sum on debentures of \$100 each, to be issued as the work progressed, and payable by instalments of \$600 in each year, with interest at seven per cent.; and that it would require to raise annually by special rate \$642 for paying said debt and interest.

*Held, that the by-law shewed clearly that the interest was to be raised annually on the \$600, not on the \$3,000.*

*Held, also, following, but not agreeing with, The Corporation of North Gwillimbury v. Moore, 15 C. P. 445, that the corporation were authorized to allow a higher rate of interest than seven per cent.*

Remarks as to the necessity of legislation on this subject.

The by-law did not name a day when it should take effect, and no notices were given as required by secs. 424 and 425 in case of a by-law for opening or altering a road, but the notices were under sec. 231, sub-sec. 2, as of a money by-law to be voted on. *Held, that both these objections were fatal.*

*Held, also, that the Municipal Council in such cases must acquire the title to the road before raising the money; and, Semble, that the arrangement with the other municipalities must also be first completed. Re Nichol and the Corporation of the Township of Alnwick, 577.*

See TEMPERANCE ACT OF 1874.

## NEGLIGENCE.

*By R. W. Co. in crossing line of another R. W. Co.*—See RAILWAYS AND R. W. Co.'s, 4.

See RAILWAYS AND R. W. Co.'s, 3.

## NEWSPAPER COMMENTS.

*On pending litigation.*—See CONTEMPT OF COURT, 1, 2.

## NEW TRIAL.

*Rejection of evidence.*—The erroneous exercise of discretion in refusing to allow question irrelevant to the issue, is no ground for a new trial. *Hickey v. Fitzgerald*, 303.

*Refused, where there was a verdict for plaintiff on a plea of arson in an action on a policy of insurance.*—See INSURANCE, 3.

## ORE.

*Severed from the land—Whether conveyed by deed of land and ores.*—See DEED.

## PARLIAMENT.

*Election petition—Order to pay out deposit money.*—A petition filed on the 6th of February, 1875, against an election, held in December, 1874, was intitled in the Election Court, which Court had been abolished by the 37 Vic. ch. 10. D., passed on the 26th of May, 1874, except as regarded elections held before that Act. The deposit of \$1,000 was made on the same day with D., who was clerk of the Election Court as well as of this Court, and who signed a receipt for it as clerk of the Election Court, headed in that Court.

*Held*, that this Court had no power to make an order on D. to pay out the money, he having received it as clerk of another Court. *Re Kingston Election—Stewart v. Macdonald*, 310.

*Counsel fees in divorce proceedings.*—See COUNSEL FEES.

*Power of Provincial Legislature.*—See CONSTITUTIONAL LAW.

## PAYMENT.

*Out of Court, of money deposited on filing election petition.*—See PARLIAMENT.

## PENDING TRIAL.

*Contempt of Court.*—See CONTEMPT OF COURT, 1, 2.

## PLEADING.

*Joint Stock Company—Note signed by Secretary—Personal liability.*—In an action against F., the Secretary of a joint stock company, on a note signed by him, F. "Secretary" where defendant pleaded a plea setting out, *inter alia*, that it was not the intention of the parties that F. should be bound, but that the plaintiff should look only to the company. *Semble*, that this could form no defence, as it contradicted a written agreement; but the parties having gone to trial on the plea, and there being a verdict for the plaintiff, the verdict was ordered to be entered for the defendant on that branch of the plea, and the plaintiff left to move in arrest of judgment, unless defendant should elect to amend his plea. *Thomson v. Feeley* 229.

See INSOLVENCY, 1.



POLL.

*Closing too soon at election under Temperance Act of 1864.*] — See TEMPERANCE ACT OF 1864, 1.

*Notice of taking, under Temperance Act of 1864—Number of days to be kept open.*]—See TEMPERANCE ACT OF 1864, 1, 3.

POSTMASTER GENERAL.

See CHOSE IN ACTION.

POWER OF SALE.

See EXECUTORS AND ADMINISTRATORS, 1.

PUBLIC OFFICER.

See CHOSE IN ACTION.

QUEBEC.

*Law of Province of*]—See FOREIGN LAW.

RAILWAYS AND R. W. CO'S.

*Compensation for land taken—Action on award—Tender of conveyance—Title.*]—A land owner to whom compensation has been awarded for land taken by a railway company, under the Railway Act, Consol. Stat. C. 66, cannot sue upon the award before tendering a conveyance of the land. A plea to such an action, that no such conveyance had been executed or tendered, was therefore held good.

Defendants also pleaded, on equitable grounds, that after the award they tendered the sum awarded to S.,

(with whom the arbitration had been had,) who then appeared to be the owner in fee simple of the land according to the registered title: that he refused to receive it: that the defendants had since received notice that S. had not a good title, and that the plaintiffs (his executors) were not entitled to the sum awarded; and that defendants had always been ready to pay the said sum on receiving a good and sufficient conveyance of the land. *Held*, a bad plea, there being no averment that S. had not in fact a good title, nor that they had paid the money into Court under the Statute, nor that they now bring it into Court. *Cawthra et al. v. Hamilton and North-Western R. W. Co.*, 187.

2. *Award of compensation for land—Appeal against such award—38 Vic. ch. 15, O.*]—Upon a petition under 38 Vic. ch. 15, O., for the review of awards made against a Railway Company for compensation for land taken, on the ground that the sums awarded were excessive, the evidence as to value being conflicting, the awards were upheld.

*Quere*, as to the admissibility of affidavits on such an application.

The intention of the statute was not to make the Judge appealed to a substitute for the arbitrators, or to permit him to reverse their finding as to amount on the weight of evidence merely, where a similar verdict could not be set aside for excessive damages. Some misconduct, legal or otherwise, or the disregard of some legal principle must be shewn.

One of the arbitrators, an old resident and well acquainted with the locality, protested against the waste of time involved in taking the evidence of many witnesses having much

less knowledge of the value of the land than himself, and in the end, having received the evidence, refused to give up his own judgment to that of such witnesses. *Held*, that he could properly do so.

Where the company desired to take land, as authorized by sec. 129 of Consol. Stat. C. ch. 66, for an extension across three lots of their original line, which was in operation: *Held*, that the arbitrators were not required to take into consideration the additional value conferred on such land by the original construction of the railway. The intention of the Act is, that when the Act proposed to be done, whether original construction or proposed deviation, gives increased value to the land, the owners must allow for such increase. *Re Canada Southern R. W. Co. and Norvall*, 195.

3. *R. W. Act of 1868, sec. 20—Construction.*—Sub. sec. 4, sec. 20 of the Railway Act of 1868, 31 Vic. ch. 68, D., does not extend to all cases in which negligence is charged against the railway company, but to cases only of neglect coming within the provisions of sub-secs. 2 and 3. They are not prevented therefore from stipulating for a limited liability in other cases. *Scarlett v. Great Western R. W. Co.*, 211.

4. *Collision of trains at level crossing—Liability.*—Defendants' railway crossed the track of another railway on the level, and both were bound by statute to stop at least a minute before crossing, but neither did so. Defendants' line was signalled as clear, and their train, in which the plaintiff was a passenger, went on without stopping. The other line was signalled as not clear, but the train on it ran on, disregard-

ing this signal, and struck the defendants' train at the crossing, whereby the plaintiff was injured. If either train had pulled up about two seconds sooner the collision would have been avoided.

*Held*, that the defendants were liable to the plaintiff, for that their neglect to stop the required time was, so far as the plaintiff was concerned, a part of the cause of his injury and sufficiently proximate.

*Quere*, as to the liability as between the two companies.—*Graham v. Great Western R. W. Co.*, 324.

5 *Consol. Stat. C. ch. 66, sec. 80—Conditional subscription for shares—Liability of subscriber to creditors.*—The plaintiff, as a creditor of a railway company, sued defendant as a shareholder for the amount remaining due on his shares. Defendant pleaded that it was agreed between defendant and the company that if he would sign an agreement to take the shares the company would give him a contract for the construction of the railway then to be constructed, and that unless and until the contract should be so given defendant should not be bound by the agreement or become thereby a shareholder; and in pursuance of said agreement, and not otherwise, defendant signed the agreement. And defendant alleged that, without any default on his part, the company refused to give him the contract, and gave it to another; and that except as aforesaid, he never subscribed for or became the owner of the shares.

In another plea, defendant alleged that he did subscribe for the shares on the same agreement; and that until the contract should be given to him he was not to be bound by such subscription: that the contract was given to another (as in the former

plea); and that defendant had never paid, nor been asked to pay, anything on the shares, nor had he been recognized, or treated, or done any act as a shareholder in respect of said shares and that, other than as aforesaid, he never subscribed for or became the owner of said shares.

*Held*, on demurrer, by MORRISON, J., and affirmed by the full Court, that both pleas were good, as shewing that defendant never became a shareholder so as be liable to creditors, there being here no such provision as in the English Companies Act of 1867, requiring such agreements to be registered in order to bind creditors.—*Bullivant v. Manning*, 517.

## REGULÆ GENERALES.

*As to leave to plead and demur.*]—*See* page 565.

*As to dispensing with sitting in Trinity Term.*]—*See* page 566.

## REVIVOR.

*Of judgment.*]—*See* JUDGMENT.

## SALE OF GOODS.

1. *Non-acceptance — Stoppage in transitu.*]—The plaintiffs, merchants in New York, on the 4th of January, 1876, sold to E. B. & Co., merchants in Toronto, 50 bags of Jamaica coffee, and shipped it by rail to Toronto, where E. B. & Co. received it, paid the freight and placed it in a bonded warehouse. They paid the duty on and sold 23 bags, 15 before and 8 after the objection for damage hereinafter mentioned; and on the 7th February

made an assignment in insolvency to the defendant, a notice of stoppage *in transitu* having been served on the Collector of Customs on the 2nd of February. *Held*, following *Graham v. Smith*, 27 C. P. 1, that if the coffee had been accepted so as to become the property of E. B. & Co., the *transitus* would have been at an end.

On the 17th of January, E. B. & Co. wrote to their buyer in New York, stating that with the exception of 15 bags the coffee was all badly stained with some chemical substance, rendering it unmerchantable, and asking what they should do as they could not use it. The buyer answered on the 20th that he could not understand how the coffee became so, that it must have been damaged on the way to Toronto, but that he would try and get for them a reduction in price. To which on the 24th E. B. & Co. replied that there was not the least doubt but that the damage was an old one, of which the sellers could satisfy themselves by examining the goods: that they would call in a coffee roaster to inspect the lot, and if anything could be done they would communicate with him without delay:

*Held*, by GALT, J., and affirmed by this Court, that there had been no acceptance of the coffee complained of as being damaged, and that the plaintiffs were entitled to recover the same against the defendant, the assignee of E. B. & Co.—*Wilds et al. v. Smith*, 136. On appeal *held* reversing the foregoing decision that the selection of the goods by the buyer, O., acting either for E. B. & Co. or for both parties, passed the property to E. B. & Co., and that they could not reject it after a full and fair opportunity of inspection by their agent.



*Held*, also, that even if E. B. & Co. had been at liberty to rescind the contract on ascertaining that a portion of the goods were unmerchantable, they had precluded themselves from so doing by the mode in which they had dealt with them. *Held* also that even if the correspondence with O., had taken place with the plaintiff there was no evidence of a rescission of the contract. *Held*, also, following *Wiley v. Smith*, 1 App. R. 179, that the *transitus* was at an end; and that the right to stop being once lost could not be revived by a subsequent refusal of the consignee to accept a portion of the goods. *Wilds et al.*, v. *Smith*, in appeal, 2 App. 8.

2. *Delivery and acceptance—Lien.*—The defendants having a stock of lumber at Milton agreed verbally to sell it to M., to be delivered at Bronte station on the Great Western Railway, for \$12 per 1000, and to be paid for as shipped from the station by him, which he was to do as fast as defendants hauled it there. M. paid on the making of the agreement \$1,000 on account of the purchase money. At first M. shipped it away as fast as it was delivered at the station, and afterwards not so rapidly, but with defendants' knowledge, and without objection, he culled, measured, and piled it, marked it with his initials, and left it in charge of the station master, who on his directions from time to time shipped large quantities of it. About six weeks before M. became insolvent, one of the defendants requested payment from him for the lumber then lying at the station, when M. put him off and said, "You are all right any way. You have the lumber there at Bronte Station."

*Held*, that there had been a delivery to and an acceptance and receipt by

M. of the lumber, so that defendants had lost their lien, which could not be re-established by M.'s statement to defendant. M.'s assignee was held entitled therefore as against the defendants. *Mason v. Hatton et al.*, 610.

### SALE OF LAND.

*To R. W. Co.*—*See* RAILWAYS AND R. W. Co's, 1.

### SENATE OF THE DOMINION.

*Proceedings for divorce before committee of.*—*See* COUNSEL FEES.

### SPECIAL CASE.

*Stated under Imperial Statute, 22 & 23 Vic. ch. 63.*—*See* FOREIGN LAW.

### STATUTES.

Insolvent Act of 1869, secs. 92, 93, 147.]—*See* INSOLVENCY, 1.

Consol. Stat. C. ch. 66, sec. 80.]—*See* RAILWAYS AND R. W. Cos, 5.

C. S. C. ch. 66, sec. 129.]—*See* RAILWAYS AND R. W. Cos., 2.

C. S. U. C. ch. 93, secs. 6, 7, 8.]—*See* SURVEY, 2.

13-14 Vic. ch. 67.]—*See* ASSESSMENT AND TAXES, 1.

22-23 Vic. ch. 63.]—*See* FOREIGN LAW.

31 Vic. ch. 68, sec. 20, sub-sec. 2, 3, 4.]—*See* RAILWAYS AND R. W. Cos., 3.

32 Vic. ch. 36, sec. 110, 130, 155, O.]—*See* ASSESSMENT AND TAXES, 2.

35 Vic. ch. 12, O.]—*See* LANDLORD AND TENANT, 3.

36 Vic. ch. 10, sec. 4, O.]—*See* EVIDENCE, 1.

36 Vic. ch. 20, sec. 40, O.]—*See* EXECUTORS AND ADMINISTRATORS, 1.

36 Vic. ch. 48, sec. 75, O.]—*See* MUNICIPAL CORPORATIONS, 2.

36 Vic. ch. 48, sec. 409, O.]—*See* WAYS, 2.

36 Vic. ch. 48, sec. 413, O.]—*See* MAN-  
DAMUS.



36 Vic. ch. 48, sec. 430, sub-sec 2, O.]  
—See MUNICIPAL CORPORATIONS, 3.

37 Vic. ch. 10, D.]—See PARLIAMENT.

37 Vic. ch. 16, sec. 19, O.]—See MAN-  
DAMUS.

37 Vic. ch. 32, [secs. 28, 34, O.]—See  
EVIDENCE, 1.

38 Vic. ch. 7, D.]—See CHOSE IN ACTION, 1.

38 Vic. ch. 15, O.]—See RAILWAYS AND  
R. W. COS., 2.

38 Vic. ch. 16, sec. 11, O.]—See JUDGMENT.  
See LIMITATION OF ACTIONS, 2.

38 Vic. ch. 19, secs. 18, 19, 20, O.]—  
See APPRENTICES AND MINORS.

38 Vic. ch. 65, O.]—See INSURANCE, 3.

39 Vic. ch. 29, sec. 1, sub-sec. 3, and  
sec. 7, O.]—See MEMORIAL.

## STOCK.

See RAILWAYS AND R. W. Co's., 5.

## STOPPAGE IN TRANSITU.

See SALE OF GOODS, 1.

## SURRENDER.

*By operation of law.*]—See LAND-  
LORD AND TENANT, 2.

## SURRENDER TO CROWN.

*Enrolment of.*]—See ENROLMENT.

## SURVEY.

1. *Patent issued before*—*Subse-  
quent survey*—*Double-fronted conces-  
sions.*]—The plaintiff claimed a piece  
of land as part of lot ten in the first  
concession west of the Communica-  
tion road in the township of Harwich;  
the defendants claimed it as part of  
lot nine; and the plaintiff was en-  
titled to recover if the line between  
the lots was to be run as in the case  
of a double not a single-fronted con-  
cession. It appeared that lots nine  
and ten were described for patent by

metes and bounds in 1793, and letters  
patent were soon after issued in accor-  
dance with this description. The  
original survey of that part of the  
township was not completed on the  
ground, but the surveyor laid out the  
Communication road as directed and  
returned a plan shewing it, and, as  
the learned Judge who tried the case  
without a jury found, he gave the  
information upon which the descrip-  
tion for these lots and for others about  
the same time were prepared. The  
principle of survey with double-fronts  
was not in use before 1820. In 1821  
another surveyor was instructed by  
the government to complete the sur-  
vey of this township with double-  
fronted concessions, and to explore  
and survey the road, but not to  
interfere with the lands ceded inter-  
secting it. No posts on the ground  
were found along the Communication  
road, and he laid out the lots along  
it as double-fronted.

*Held*, that the latter survey, made  
after the patents for these lots, could  
not affect them: that the principle  
of survey with double-fronts could  
not be applied to the grant made  
long before it was adopted; and that  
the plaintiff, therefore, could not  
succeed. *McGregor v. McMichael et  
al.*, 128.

2. *Consol. Stat. U. C. ch. 93, secs.  
6, 8*—*Survey under.*]—A surveyor  
employed by the Government, under  
*Consol. Stat. U. C. ch. 93, secs. 6,  
8*, to survey a concession line alleged  
not to have been run in the original  
survey, or to have been obliterated,  
instead of attempting to make a sur-  
vey in accordance with those sections,  
satisfied himself that the original line  
could be found and endeavoured to  
retrace it.

*Held*, following *Tanner v. Bissell*,  
21 U. C. R. 553, that such survey

was not binding under the statute ; and the Court, on the evidence given at the trial, affirmed the finding of the learned Judge, who tried the case without a jury, that the line so run was not in fact the same as the original line.

*Semble*, that in order to prove a survey which will be conclusive under the statute, the application by the County Council to the Government for such survey must be shewn. *Boley v. McLean*, 260.

### TAVERN AND SHOP LICENSES.

*See* EVIDENCE, 1.—LIQUOR, SALE OF

### TAX SALE.

*Irregularities in.*]—*See* ASSESSMENT AND TAXES, 2.

### TEMPERANCE ACT OF 1864.

1. *Temperance Act of 1864—Voting on by-law—Poll closed too soon—Absence of reeve—Notice of meeting.*]—A by-law under the Temperance Act of 1864 having been carried in a county by a majority of 794, it appeared that in one township, where there were over 800 names of qualified electors on the roll, only two days' polling were allowed, leaving 399 votes unpolled in that township. On the second day more than half an hour elapsed without a vote being tendered, but the poll was not closed on that account. *Held*, no ground for setting aside the by-law, for the number of votes left unpolled were not sufficient to have affected the result of the election. It was argued that the premature closing of the poll

in this township caused those opposed to the by-law in two other townships, in which over 600 votes were left unpolled, to relax their efforts, and so that the result was or might have been affected by it ; but *Held*, that this was a consequence too remote to be considered.

There must be three days' polling where the names on the roll exceed 800, though they may be less than 1200.

It is not necessary that the notice of taking the vote should specify the number of days' polling to be allowed, though it would be more convenient.

The reeve in one of the townships was present at the commencement of the meeting, and presided during the first day, but was absent during the second day, when the clerk was in attendance. *Held*, that this, in the absence of anything improperly done or omitted in consequence, or of any effect on the result in that township, was not a fatal objection.

*Quære*, whether it would have been different had the by-law been one of that township only. *Re Malone and the Corporation of the County of Grey*, 159.

2. *By-law fixing day to come in force.*]—A by-law passed under the Temperance Act of 1864, to prohibit the sale of intoxicating liquors and the issue of licenses therefor within a county, provided that it should come into force on the first day of May.

*Held*, illegal, as being contrary to the Act, which declares that such by-laws shall come into force from the first of March next after the communication thereof to the collector of inland revenue, and shall contain only the simple declaration of prohibition. *Re O'Neil and the Corporation of the County of Oxford*, 170.

3. *Notice of taking the poll—Number of days polling.*—It is not necessary that the notice of taking a poll to decide upon a by-law under the Temperance Act of 1864, should state the number of days during which the poll will be kept open.

The number of days polling must be decided by the number of names of qualified municipal electors upon the roll. All those on the roll who are not qualified, such as minors, women, &c., must be excluded. *Re Hamilton and the Corporation of the County of Brant*, 253.

### TENDER.

*Of conveyance to railway by owner of land before suing for compensation.*—See RAILWAYS AND R. W. Co.'s, 1.

### TITLE.

*Representation as to.*—See INSURANCE, 1.

*To land.*—See RAILWAYS AND R. W. Co.'s, 1.

See LIMITATION OF ACTIONS, 1.

### TREASURER OF COUNTY.

*Neglect of, to return roll of lands in arrear for taxes.*—See ASSESSMENT AND TAXES, 2.

### TRESPASS.

See DIVISION COURT.

### TRIAL.

*Of action for debt under secs. 92-93, Insolvent Act of 1869.*—Where

fraud is charged, may be had before a Judge and common jury, or a Judge alone. *Elley et al. v. Pratt*, 365.

### TROVER.

*Conversion—Jus Tertii—Damages—Vendor's Lien.*—C., on the 20th August, 1874, sold land to one G. for \$8,500, and took a mortgage on the property for \$6,000, and two joint notes of G. and M. for the balance. These notes were handed by C. to defendant to keep for him, defendant being aware that he was in pecuniary difficulty, and a writ of attachment in insolvency issued against him on the 1st of September. The plaintiff being appointed assignee, demanded the notes from defendant, who disposed of them for C.'s benefit, with knowledge of the plaintiff's claim, and the plaintiff brought trover. It appeared that the plaintiff had filed a bill to set aside the sale of the land by C. as fraudulent, which suit was pending at the commencement of this action; and it was proved that the makers of the notes were worthless, unless they could be said to have a vendor's lien on the land for the amount unsecured.

*Held*, that defendant had been guilty of a conversion of the notes, for which, shewing no right or authority under the makers, he could not dispute the plaintiff's right to sue, notwithstanding the plaintiff was disputing the sale out of which they arose; but that the insolvent having taken a mortgage on the land for part of the purchase money, had waived his vendor's lien for the remainder.

The defendant having brought into Court one of the notes for \$1,000, about the value of the lien if it had existed, it was ordered to be delivered

to the plaintiff, and the verdict which had been rendered for \$1,000 was reduced to nominal damages. *Drifill v. McFall*, 313.

See DIVISION COURT.

## TRUSTS AND TRUSTEES.

See MUNICIPAL CORPORATIONS, 2.

## ULTRA VIRES.

See CORPORATION, 2.

## VENDOR'S LIEN.

See TROVER, 1.

## VERDICT.

See PLEADING, 1.

## WAIVER.

*Of irregularity in entituling pleadings and affidavits.*—See EVIDENCE, 4.

## WARRANTY.

*Of answers to questions in life insurance application.*—See INSURANCE, 2.

## WAYS.

1. *County grant to township roads.*—A county by-law, granting moneys to local municipalities in it to assist in improving, &c., roads in such local municipalities, quashed, as *ultra vires*. *Re Strachan and the Corporation of the County of Frontenac*, 175.

2. *Highway—Neglect to repair—Limitation of action*—36 *Vic. ch. 48, sec. 409, O.*—Defendants made a hole in the highway in order to ascertain whether repairs were required there, but they did not replace the materials or fill up the hole, nor place a light there; and the plaintiff, crossing the road, fell against the materials so left, and into the hole. *Held*, a cause of action within sec. 409 of the Municipal Act of 1873, and that the plaintiff suing after three months was barred. *Pearson v. The Corporation of the County of York*, 378.

See MANDAMUS—MUNICIPAL CORPORATIONS, 3.

## WILL.

See EXECUTORS AND ADMINISTRATORS, 1.

## WITNESSES.

*Compelling defendant charged with offence under Liquor Acts to testify against himself.*—See EVIDENCE, 1.

## WORDS.

*"American Currency."*—See BILLS AND NOTES, 1.

*"Bona fide possessor of land."*—See FOREIGN LAW.

*"Crime."*—See EVIDENCE, 1.

*"Proceeding."*—*"Charged upon or payable out of land."*—See JUDGMENT.

*"Release."*—See LANDLORD AND TENANT, 3.











